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Federal Declaratory Relief and the Non-Pending State Criminal Suit

Notes and Comments

FEDERAL DECLARATORY RELIEF AND THE NON-PENDING STATE CRIMINAL SUIT

When a party seeks the aid of a federal court in preventing state criminal sanctions from nullifying a right secured by the Constitution of the United States, "the harmonious relation between state and federal authority"[1] is directly drawn into question.[2] The Supreme Court's[3] effort to preserve "Our Federalism"[4] has resolved itself, essentially, into a balancing test.[5] The two interests to be weighed are the federal court's interest in adjudicating federal claims[6] and the state court's concern for the orderly

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1. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941) (concerning abstention).

2. Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) (denying the remedy of an injunction against the enforcement of a state court injunction because the federally sought injunction did not fit within one of the exceptions to the federal anti-injunction statute. 28 U.S.C. § 2283 (1970)). *See* especially *id.* at 285-86.

3. Congress has also acted. The present anti-injunction statute, 28 U.S.C. § 2283 (1970), provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Despite a tendency in the inferior courts to read the statute as a mere policy declaration, *e.g.*, Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), the Court has held that the statute's enumerated exceptions exhaust the field. Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970); Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955). Nevertheless, in Mitchum v. Foster, 407 U.S. 225 (1972), the Court construed 42 U.S.C. § 1983 (1970) to fall within the exception "expressly authorized by Act of Congress", but remanded the case for consideration of the propriety of injunctive relief in light of comity. Thus, comity may preclude the issuance of an injunction "expressly authorized" by 42 U.S.C. § 1983 (1970).

4. Younger v. Harris, 401 U.S. 37, 44-45 (1971).

5. *See* the cases cited notes 10 and 11, *infra*. Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972); Note, *Implications of the* Younger *Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972); Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation*, 83 HARV. L. REV. 1870 (1970).

6. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928), which notes that by the Judiciary Act of March 3, 1875

> . . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution . . . .

This language was cited with approval and then elaborated on by the Court in Zwickler

administration of the laws of the state.[7] Comity is the primary doctrine developed by the Court to achieve a proper balance.[8]

In the Supreme Court's "February Sextet"[9] of *Younger v. Harris*[10] and companion cases[11] Mr. Justice Black, writing for the majority, expressed what comity requires of a federal court when its aid is sought against a state's criminal process.[12] *Dyson v.*

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v. Koota, 389 U.S. 241, 247-48 (1967) (refusing to abstain in a declaratory suit attacking a New York State statute for overbreadth):

> In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because the state courts also have the solemn responsibility, equally with the federal courts, ". . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . ." *Robb v. Connolly*, 111 U.S. 624, 637.

7. *See* 28 U.S.C. § 2283 (1970); Zwickler v. Koota, 389 U.S. 241, 254-55 (1967); cases cited in notes 10 and 11 *infra*; Foster v. Zeeko, 362 F. Supp. 295, 297 (N.D., Ill. 1973) ("Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.").

8. Younger v. Harris, 401 U.S. 37 (1971) treats comity as the federal courts' sensitivity to legitimate interests of the states:

> [T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

This notion, "posited on a proper respect for state functions and a recognition that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways", Modern Social Education, Inc. v. Preller, 353 F. Supp. 173, 178 (D. Md. 1973), finds manifestation both in statutes, *e.g.* 28 U.S.C. § 2283 (1970), and in judicial doctrine, *e.g.*, abstention. Yet, comity is larger than the sum of the parts. Mitchum v. Foster, 407 U.S. 225 (1972), demonstrates that even if section 2283 does not bar an injunction, comity might. Zwickler v. Koota, 389 U.S. 241, 254-55 (1967), indicates that even if abstention is not proper, the propriety of injunctive or declaratory relief is a separate question.

9. Apparently, credit for the phrase belongs to Judge Goldberg, LeFlore v. Robinson, 446 F.2d 715, 718 (5th Cir. 1971) (concurring opinion).

10. 401 U.S. 37 (1971).

11. Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971) (per curiam); Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam).

12. In *Younger* the plaintiff, under indictment for violation of the state Criminal Syndication Act, filed a complaint in federal district court to enjoin the state prosecution on the grounds that the statute was unconstitutional. The Supreme Court held that traditional principles of equity required that federal injunctive relief be deemed inappropriate absent a "showing of bad faith, harassment, or any other unusual circumstances . . . ." 401 U.S. at 54.

Samuels presented the court with the same fact pattern except that the plaintiffs requested both injunctive and declaratory relief. *Younger* was held dispositive of the prayer for injunctive relief. 401 U.S. at 68-69. The Court, analogizing to *Younger*, then held considerations of comity to require that a declaratory judgment be deemed as inappropriate as an injunction. *Id.* at 71-73.

Boyle involved a suit by seven Negroes attacking the constitutionality of various state

Stein[13] provides the most succinct statement of the rule of the sextet:[14]

> Today we have again stressed the rule that federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, is proper only where irreparable injury is threatened.

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laws and local ordinances. The Supreme Court denied declaratory and injunctive relief. Seemingly, the denial was premised on the lack of standing inasmuch as none of the plaintiffs had been threatened with prosecution under the challenged statutes. 401 U.S. at 80-81. See note 74 *infra*. However, it is possible for *Boyle* to be read as holding declaratory relief inappropriate in the non-pending instance unless irreparable injury can be demonstrated. See note 19 *infra*.

The plaintiff in *Perez* operated a newstand in a Louisiana parish. State officials charged him with violating both a state statute and a parish ordinance forbidding the display for sale of obscene materials. Subsequent to the commencement of state criminal proceedings, the plaintiff sought federal injunctive and declaratory relief. A three-judge district court held the statute constitutional and denied the injunction. The panel did, however, supress the evidence taken by the state on the basis of an illegal search. The Supreme Court, finding the disruptive effects of the suppression order to be equivalent to those of an injunction, held the order to be inappropriate absent a showing of irreparable injury. 401 U.S. at 84-85. The majority further held that an earlier declaration about the constitutionality of the parish ordinance by a single district judge was not properly before the Court. *Id.* at 86.

Dyson, like *Perez*, involved a request for federal injunctive and declaratory relief against a state statute regulating possession of obscene materials. A three-judge district court had issued the necessary declaratory and injunctive relief notwithstanding the pendency of state proceedings. The Supreme Court, under the principles of *Younger*, reversed and remanded for a finding of the irreparability of injury. 401 U.S. at 203.

The Court's disposition in *Byrne* was similar. The plaintiffs, movie theater owners who wanted to exhibit the film "I am Curious (Yellow)", sought an injunction against a pending state prosecution and a declaration that the Massachusetts film obscenity law was unconstitutional. A three-judge district court, holding that the plaintiffs would suffer irreparable injury if not permitted to exhibit the film publicly, granted relief. The Court rejected the finding of irreparable injury and remanded to the district court with the notation:

> There was, however, finding by the District Court that the threat to appellees' federally protected rights is "one that cannot be eliminated by [their] defense against a single criminal prosecution." *Younger v. Harris* . . . .

401 U.S. at 220.

13. 401 U.S. 200 (1971) (per curiam). See note 12 *supra*.

14. 401 U.S. at 203. Younger v. Harris, 401 U.S. 37, 53-54 (1971) (injunctive relief); Samuels v. Mackell, 401 U.S. 66, 71-73 (1971) (declaratory relief). This interpretation of the scope of the sextet was recently affirmed in Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974), in which Mr. Justice Brennan, for the majority of a Court unanimous in result, wrote:

> When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed [the *Younger* sextet] held . . . that, unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute.

Id. at ___, 94 S. Ct. at 1213. See text accompanying notes 35-54 *infra*.

Samuels v. Mackell,[15] the second decision of the sextet, expressly holds that, when state criminal proceedings are pending[16] against the federal court plaintiff, irreparable injury is needed for declaratory relief to issue. Factually,[17] and by express reservation,[18] the question of the dependence of the propriety of declaratory relief in the non-pending criminal proceeding upon a showing of irreparable harm was left open.

A rationale to extend the sextet's principle of comity to this non-pending situation may be built from Justice Black's broad language.[19] This language indicates that, absent extraordinary circumstances, a federal court should not issue a declaratory judgment about the constitutionality of a state criminal statute

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15. 401 U.S. 66 (1971).

16. In *Younger, Samuels, Perez, Dyson,* and *Byrne* the federal court plaintiff had been indicted in state court for violation of the challenged statute at the time the federal complaint was filed. Under these facts, the Court was able to conclude that in each case the plaintiff was seeking federal relief from pending state criminal prosecutions. A deficiency in this result is that, while the Court placed heavy emphasis upon the pendency of state proceedings, the Court provided no definition of pending state proceedings. See notes 27 and 130-31 *infra*.

17. See note 12 *supra*.

18. Samuels v. Mackell, 401 U.S. at 73-74; Younger v. Harris, 401 U.S. at 54-55 (Stewart, J., concurring).

19. Justice Black's reconciliation of Dombrowski v. Pfister, 380 U.S. 479 (1965) (grant of federal declaratory and injunctive relief from future state prosecution) in Younger v. Harris, 401 U.S. 37 (1971) (denial of federal injunctive relief against a pending state prosecution) would appear to ignore any distinction between pending and non-pending state criminal prosecutions. It would make denial of federal relief in either instance obligatory unless a showing of irreparable injury could be made.

> Just as the incidental "chilling effect" of such statutes [regulating free expression] does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.
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> Beyond all this is another more basic consideration. Procedures for testing the constitutionality of a statute "on its face" in the manner apparently contemplated by *Dombrowski*, and for then enjoining all action to enforce the statute until the state can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan . . . .

Id. at 51-52.

There is further language in Boyle v. Landry, 401 U.S. 77 (1971) to the effect that federal relief, absent irreparable injury, is always inappropriate. Although no state prosecutions were pending against the federal court plaintiffs, Justice Black suggested that the denial of injunctive and declaratory relief could be premised upon traditional principles of equity:

> There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the state is left free to prosecute under the intimidation statute in the normal manner.

even if no state proceedings are pending.[20]

Justice Brennan, joined by two other justices, sought in the third case of the sextet, *Perez v. Ledesma*,[21] to rebut such sweeping implications. While the *Perez* majority disposed of the non-pending state criminal suit aspect of the case on considerations of the Three Judge Court Act, Justice Brennan disagreed with this resolution.[22] He argued that when no criminal proceedings exist declaratory relief should issue.

Two arguments were advanced by Justice Brennan to support his position for declaratory relief. Given the desideratum of a federal forum for adjudication of federal rights and the theoretical unintrusiveness of a declaratory judgment, Justice Brennan contended that considerations of comity struck a different balance. Because there would not be a state forum, state interests were minimal in the non-pending situation. Hence, they were outweighed by the federal interest in protecting constitutional rights.[23] Additionally, reasoning from the legislative history[24] of the Declaratory Judgment Act,[25] the Justice concluded:[26]

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20. *See*, Note, *Implications of the* Younger *Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending*, 72 COLUM. L. REV. 874, 890-91 (1972); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 304-06 (1971).

21. 401 U.S. 82, 93 (1971) (Brennan, White, Marshall, JJ., concurring and dissenting).

22. The issue was whether the three-judge court or a single district judge, who also sat on the three-judge panel, had declared a Parish ordinance unconstitutional. The majority in *Perez* held that Judge Boyle, sitting as a single district judge, had issued the declaration. Therefore, it was not directly reviewable by the Court. *Perez*, 401 U.S. at 86. Justice Brennan contended that Judge Boyle in his capacity as a member of the three-judge panel had declared the Parish ordinance unconstitutional. In accordance with Milky Way Productions v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), *aff'd*, 397 U.S. 98 (1970) (per curiam, approving the principle that once three-judge court jurisdiction attaches over one claim, the panel may consider other issues which alone would not require three judges) Justice Brennan considered the declaration properly before the Court. 401 U.S. at 94-95, 98-101. Because Louisiana, prior to the federal hearing, had entered a *nolle prosequi* on the violation charged against the federal court plaintiffs, Justice Brennan regarded the propriety of federal declaratory relief under non-pending circumstances as posited before the Court. *Id.* at 101.

23. 401 U.S. at 104. The argument made asserts that when there is no state prosecution pending which would allow presentation of the constitutional issue, the federal forum must be deemed appropriate for adjudication of that issue. While Justice Brennan concurred in the *Samuels'* result, he argued that, in the non-pending situation, declaratory relief was less harsh to the state than injunctive relief. *Id.* See note 105 *infra*.

24. The Declaratory Judgment Act was the result of favorable Congressional response to Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249 (1933) (where the Court, reviewing a state court judgment on constitutional grounds, upheld the state's declaratory judgment act). The Act of June 14, 1934, ch. 512, 48 Stat. 955, was held constitutional in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

25. 28 U.S.C. § 2201 (1970) provides:

In a case of actual controversy within its jurisdiction, except with respect to

> [H]istory compels rejection of the Court's suggestion that although no informations were pending at the time of the hearing, declaratory relief was inappropriate in the absence of showing "that appellees would suffer irreparable injury of the kind necessary to justify federal injunctive interference with the state criminal processes." Congress expressly rejected that limitation and to engraft it upon the availability of the congressionally provided declaratory remedy is simply judicial defiance of the congressional mandate. It is nothing short of judicial repeal of the statute. If the statute is to be repealed or rewritten, it must be done by Congress, not this Court.

As a standard for the issuance of declaratory relief when no state criminal prosecution was pending,[27] Justice Brennan advocated

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Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not future relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 (1970) provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

See E. BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941).

Acceptance of the declaratory judgment as a judicial remedy was brought about largely by the efforts of Professors Edwin Borchard of Yale and Edson Sunderland of Michigan. C. WRIGHT, LAW OF FEDERAL COURTS § 100 (2d ed. 1970) [hereinafter cited as WRIGHT]. Professor Borchard, prior to the development of the problem discussed in this comment, maintained:

> One of the principal purposes of the declaratory action is the removal of clouds from legal relations. By dissipating peril and insecurity and thus stabilizing legal relations, it avoids the destruction of the status quo, and assures a construction of interpretation of the law *before* rather than after breach or violence.

Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445 (1943).

26. Perez v. Ledesma, 401 U.S. at 115-16 (citations omitted).

Again, Professor Borchard's views were important. Justice Brennan relied on the professor's statement to the Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess. (1928) in conjunction with hearings on H.R. 5623, the ancestor of the Declaratory Judgment Act, to the point that: "[T]here is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality." *Perez*, 401 U.S. at 114-15.

27. Referring to the pendency demarcation, Justice Brennan wrote:

> Thus where no criminal prosecution involving the federal court parties is pending when federal jurisdiction attaches, declaratory relief determining the disputed constitutional issue will ordinarily be appropriate to carry out the purposes of the Federal Declaratory Judgment Act and to vindicate the great protections of the Constitution.

Id. at 130. *See also* note 26 *supra*. Justice Brennan appears to be inconsistent in his articulation of the dispositive date for the determination of the pendency at state proceedings. At one point he intimates that pendency is to be ascertained "at the time of the

the traditional requirements under the Declaratory Judgment Act.[28]

Although a theory to support the withholding of federal relief can be implied from the strong language employed by Justice Black, the arguments advanced by Justice Brennan have persuaded a majority of the inferior federal courts[29] that irreparable injury is not a requirement for declaratory relief when no state criminal proceeding is pending against the federal court plaintiff. This coalescence on the circuit and district level is supported by the Court's vigorous language, per Mr. Justice Brennan, in *Lake Carriers' Association v. MacMullan*.[30] Referring to the February sextet, Justice Brennan noted:[31]

> [T]his Court held that, apart from "extraordinary cir-

[federal] hearing", *id.* at 115, but then broadens the availability of federal relief by making state proceedings pendent at the time "when federal jurisdiction attaches," *id.* at 130, *i.e.*, when the federal complaint is filed. See notes 130-31 *infra* and accompanying text.

28. The elements that Justice Brennan regarded as indispensable to the issuance of declaratory relief were that "the case-or-controversy requirements of Article III are met, . . . the narrow special factors warranting federal abstention are absent, and . . . the declaration will serve a useful purpose in resolving the dispute." *Perez*, 401 U.S. at 121-22.

29. *See, e.g.*, Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973); Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973), *cert. denied*, ___ U.S. ___, 94 S. Ct. 1968 (1974); Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973); Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973) *rev'd on other grounds*, ___ U.S. ___, 94 S. Ct. 1536 (1974); Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973); Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973); Armour and Co. v. Ball, 468 F.2d 76 (6th Cir. 1972); Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Salem Inn, Inc. v. Frank, 364 F. Supp. 478 (E.D.N.Y. 1973); Foster v. Zeeko, 362 F. Supp. 295 (N.D. Ill. 1973); Rakes v. Coleman, 359 F. Supp. 370 (E.D. Va. 1973); Doe v. Israel, 358 F. Supp. 1193 (D.R.I. 1973); Barrick Realty, Inc. v. City of Gary, Indiana, 354 F. Supp. 126 (N.D. Ind. 1973); Cine-Com Theatres Eastern States, Inc. v. Lordi, 351 F. Supp. 42 (D.N.J. 1972); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), *cert. denied*, ___ U.S. ___, 94 S. Ct. 1587 (1974); Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971); Kennan v. Nichol, 326 F. Supp. 613 (W.D. Wis. 1971). *But see* Ellis v. Dyson, 358 F. Supp. 262 (N.D. Tex), *aff'd without opinion*, 475 F.2d 1402 (5th Cir. 1973), *cert. granted*, ___ U.S. ___, 94 S. Ct. 1967 (1974); Cooley v. Endictor, 340 F. Supp. 15 (N.D. Ga. 1971), *aff'd* 458 F.2d 513 (5th Cir. 1973) (per curiam); Modern Social Education, Inc. v. Preller, 353 F. Supp. 173 (D. Md. 1973); Independent Tape Merchant's Ass'n v. Creamer, 346 F. Supp. 456 (M.D. Pa. 1972).

30. 406 U.S. 498 (1972). The Fifth Circuit has also found a suggestion by the Supreme Court of the "viability of the pending/threatened distinction" through a comparison of Roe v. Wade, 410 U.S. 113 (1973) with Doe v. Bolton, 410 U.S. 179 (1973). Jones v. Wade, 479 F.2d 1176, 1181 (5th Cir. 1973).

31. 406 U.S. at 509 (emphasis added). *Query* whether the last clause takes away the force of the rest of the statement by not answering the question of what standards are required. See H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM at 1046 n.6 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

> cumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a *pending* state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate *if* the conditions for declaratory or injunctive relief are met.

Indeed, following this decision, the federal courts which have held declaratory relief available under such circumstances have cited *Lake Carriers'* as authority for such resolution.[32] However, a strict reading of *Lake Carriers'* requires the conclusion that the above quoted language is no more than dictum[33] supported only by Jus-

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32. *See* Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973); Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973); Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973); Armour and Co. v. Ball, 468 F.2d 76 (6th Cir. 1972); Salem Inn, Inc. v. Frank, 364 F. Supp. 478 (E.D.N.Y. 1973); Rakes v. Coleman, 359 F. Supp. 370 (E.D. Va. 1973); Cine-Com Theatres Eastern States, Inc. v. Lordi, 351 F. Supp. 42 (D.N.J. 1972).

33. To the Supreme Court the dispositive issue in *Lake Carriers* was abstention. The district court had failed to reach the merits of the complaint on the grounds that "the lack of a justiciable controversy precludes entry of this Court into the matter. . . . An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion . . . ." 336 F. Supp. 248, 253 (E.D. Mich. 1971). Before the Supreme Court, the appellants first urged the existence of "an actual controversy" within the meaning of the Declaratory Judgment Act, 406 U.S. at 506, and, secondly, that "the District Court erred in abstaining from deciding the merits of their complaint." *Id.* at 509.

Factually, *Lake Carriers* involved a pre-emption challenge to the Michigan Water Pollution Control Act of 1970. State officials had interpreted the provisions of that Act to prohibit discharge of sewage, whether treated or untreated, into Michigan waters. Thus, they required vessels with marine toilets to maintain on-board sewage storage facilities. The appellants, operators of bulk cargo vessels on the Great Lakes, sought federal injunctive and declaratory relief on the basis of federal pre-emption. Because the state conceded that the Michigan statute would be pre-empted — when the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, became effective—the appellants' complaint was essentially that they were being compelled, under pain of criminal sanctions, to comply with the more rigorous standards of the Michigan Act pending the effective date of the federal act.

On grounds of abstention the Supreme Court affirmed the district court. 406 U.S. at 509. The Court first held that there was a justiciable controversy, *id.* at 506, and then considered the issue of abstention. Abstention was held proper for two reasons: (1) the proposed federal standards had not then been published, and such regulations might bear on Michigan's interpretation of its statute; and (2) the Michigan Statute contained certain ambiguities which, if ever presented to a state court, might be construed in accordance with the federal standards. *Id.* at 510-12. The Court, therefore, remanded to the district court "with directions to retain jurisdiction pending institution by appellants of appropriate proceedings in Michigan courts." *Id.* at 513.

Hence, *Lake Carriers* dealt only with the issue of abstention and not with the propriety of federal declaratory relief. The Court, itself, alluded to a distinction between the two issues by commenting that "[t]he question of abstention, of course, is entirely separate from the question of granting declaratory or injunctive relief." *Id.* at 509 n.13. Justice

tice Brennan's *Perez* opinion.[34]

Nevertheless, this dictum foreshadowed[35] the Court's opinion in its first opportunity to speak to the propriety of federal declaratory relief under non-pending circumstances.[36] In *Steffel v. Thompson*,[37] the Court held that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a dis-

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Brennan's remark concerning the propriety of federal declaratory relief in the non-pending situation, therefore, can be regarded as no more than dictum.

Justice Brennan apparently recognized this point in Steffel v. Thompson, ___ U.S. ___, ___ n.21, 94 S. Ct. 1209, 1223 n.21 (1974), by citing *Lake Carriers* for the proposition that abstention and the propriety of federal relief are separate and distinct concepts.

34. 406 U.S. at 510. The Fifth Circuit has referred to this statement in *Lake Carriers*—that in the absence of a pending prosecution, declaratory relief may be appropriate—as "gratuitous" and "inconceivable" in view of the careful reasoning of *Younger*. Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972), *petition for rehearing denied*, 463 F.2d 1338, *rev'd sub nom.* Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974).

35. Indeed, after the *Lake Carriers* decision, it became apparent that a clear majority of the Supreme Court might favor federal declaratory relief when no state criminal proceedings are pending. Judge Brown, dissenting in the denial of a rehearing in Becker v. Thompson, 463 F.2d 1338, 1339 (5th Cir. 1972), did the head counting of the Justices.

> Admittedly the Court in *Lake Carriers* was concerned primarily with the problem of abstention and only indirectly with the potential applicability of the *Younger* sextet. However, in a dissenting opinion both Mr. Justice Powell and the Chief Justice [406 U.S. 498, 513 (1972)] concluded that abstention was inappropriate and would have remanded the case for a trial on the merits [406 U.S. at 514], thereby negating any inference that they regarded *Younger* as a possible bar to a declaratory judgment in the absence of a pending state criminal proceeding. Since Justices Brennan, White and Marshall have adopted an equivalent point of view [*Perez*, 401 U.S. 82, 93 (1971) (concurring and dissenting)], and since Mr. Justice Douglas obviously shares it [Dyson, 401 U.S. 200, 211 (1971) (dissenting opinion)], I have considerable difficulty avoiding the conclusion that the question [of the propriety of declaratory relief when no state proceeding is pending] has been regarded as closed by two-thirds of . . . the Court.

36. The Court was presented with the opportunity to address itself to the propriety of federal declaratory relief in the non-pending situation in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Curiously, the Court affirmed the issuance of federal declaratory and injunctive relief in favor of the complainant without consideration of the applicability of the *Younger* sextet. *Mosley* involved a challenge to the constitutionality of a new Chicago ordinance prohibiting picketing around schools. The complainant, who had been in the habit of picketing a particular school, was informed, upon inquiry, by the police that if he persisted in his conduct he would be arrested for violating the new ordinance. Thereafter, the complainant ceased his picketing and sued in federal court for injunctive and declaratory relief.

37. ___ U.S. ___, 94 S. Ct. 1209 (1974). The issue argued by counsel before the Court in *Steffel* was whether a showing of irreparable injury was a prerequisite to federal intervention into a state's criminal process in the form of a declaratory judgment where no state proceeding was pending against the federal court plaintiff. 42 U.S.L.W. 3297, 3299 (excerpts of argument before the Supreme Court, November 20, 1973).

The facts involved in *Steffel* are undisputed. The action occurred at the North DeKalb Shopping Center, a large, modern, retail shopping area located near Atlanta, Georgia. The shopping center had a regulation, enforced since its opening in 1965, prohibiting

puted state criminal statute . . . ."[38] By so holding, the Court broadly sanctioned the coalescence of the inferior federal courts embracing the views of Justice Brennan in *Perez*.[39] However, certain ambiguities within the majority opinion and the concurring opinions of Justices Stewart,[40] White,[41] and Rehnquist[42] combine to indicate that *Steffel* has merely answered a portion of the question reserved in *Samuels* and does not provide an acceptable formulation for the propriety of federal declaratory relief under non-pending circumstances.[43]

This Comment, therefore, has as its purpose an examination of the propriety of federal declaratory relief when the federal court plaintiff is merely threatened by but not involved with state

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the distribution of handbills. On October 8, 1970, Steffel and his companion, Becker, stood on the exterior sidewalk of the center and distributed handbills pertaining to a meeting protesting the war in Indo-China. Upon the distributors' refusal to leave at the request of the center officials, the DeKalb County Police were summoned. The police informed the parties that unless they stopped distributing the handbills they would be arrested. Steffel and Becker departed the scene, but on October 10th they returned to the Center and resumed distribution of the handbills. The events of October 8 were then repeated: Becker refused to desist; he was arrested and charged with violating the Georgia criminal trespass statute, which provides:

> A person commits criminal trespass when he knowingly and without authority:
>
> (3) Remains upon the land or premises of another person . . . after receiving notice from the owner or rightful occupant to depart.

GA. CODE § 26-1503(b).

Steffel, however, opted to discontinue his activity rather than be arrested. Becker and Steffel then jointly filed a civil class action in federal court for declaratory and injunctive relief against the appropriate shopping center and county officials, "attacking the constitutionality of the Georgia criminal trespass statute as applied to them and their class in the distribution of handbills at the Center." Becker v. Thompson, 459 F.2d 919, 921 (5th Cir. 1972). Relying on the principles enunciated in *Younger* and *Samuels*, the district court denied Becker's prayers for relief because of the pending state criminal prosecution against her. Becker v. Thompson, 334 F. Supp. 1386, 1388-89 (N.D. Ga. 1971). No appeal was taken by Becker. Steffel, against whom no state proceeding was pending, was also denied relief by the district court. Apparently the Court reasoned that, absent a showing of bad faith enforcement of the statute by the Georgia officials, no justiciable controversy was present. *Id.* at 1389-90. On appeal by Steffel, the Fifth Circuit, affirming the district court decision, held that an extension of the principles of the *Younger* sextet, rather than the lack of controversy alluded to by the district court, required that: "under the circumstances of this case, even though no state prosecution was pending against Steffel, since there was no showing of bad faith harassment, he was not entitled to a declaratory judgment." 459 F.2d at 923. In this posture, the case was presented to the Supreme Court.

38. ___ U.S. ___, ___, 94 S. Ct. 1209, 1223-24 (1974). Under a narrow interpretation of *Steffel*, it is possible to conclude that the Court was addressing itself only to the concepts of standing and justiciability. See note 129 *infra*.

39. Justice Brennan's opinion in *Steffel* relies heavily upon his prior reasoning in *Perez*. *Id.* at ___, 94 S. Ct. at 1218-22.

40. *Id.* at ___, 94 S. Ct. at 1224.

41. *Id.* at ___, 94 S. Ct. at 1224.

42. *Id.* at ___, 94 S. Ct. at 1225.

43. See notes 142-54, *infra*, and accompanying text.

criminal proceedings. After analyzing the threshold question of justiciability, this Comment compares the intrusion of declaratory and injunctive relief upon state affairs, asks what state interest and what federal interest comity seeks to protect, and concludes that the pendency of a state criminal proceeding should not be dispositive of the question whether to issue a declaratory judgment. As a solution, this Comment proposes a test that, by focusing on the conduct of the federal court plaintiff, the personal deterrent effects of the state statute, and the adequacy of the state criminal process, balances the relevant state and federal interests.

JUSTICIABILITY

The threshold issue for any federal court presented with a prayer for declaratory relief, even before it reaches the propriety of such action, is whether a "case of controversy" exists upon which a judicial determination can be made,[44] and, collaterally, whether the particular plaintiff has standing to raise the question.[45] Although theoretically distinct, the federal courts have generally viewed the questions of case or controversy and standing in the context of the Declaratory Judgment Act to be so interrelated as to form one inquiry under the rubric of justiciability.[46] Nevertheless, the two requirements are more easily understood if viewed separately.

Case or Controversy

Maryland Casualty Co. v. Pacific Coal and Oil Co.[47] provides

44. U.S. CONST. art. III, §2. The current provisions for federal declaratory relief, found in 28 U.S.C. § 2201 (1970), embody this requirement by limiting the issuance of a declaratory judgment to "a case of actual controversy." See notes 24 and 25 *supra*.

45. Standing, as an element of the case or controversy requirement, focuses upon the requisite interest of the specific plaintiff to present a particular issue before a federal court. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923); Baker v. Carr, 369 U.S. 186 (1962); Flast v. Cohen, 392 U.S. 83 (1968); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972); HART & WECHSLER at 150-83; D. CURRIE, FEDERAL COURTS at 53-83 (1968) [hereinafter cited as CURRIE]; WRIGHT § 13.

46. *E.g.*, Thoms v. Heffernan, 473 F.2d 478, 483-85 (2d Cir. 1973); Crossen v. Breckenridge, 446 F.2d 833, 838 (6th Cir. 1971), *vacated*, 410 U.S. 950 (1973); Anderson v. Vaughn, 327 F. Supp. 101, 102 (D. Conn. 1971). *Cf.* Poe v. Ullman, 367 U.S. 497, 503-04 (1961) where the Court stated:

> The various doctrines of "standing," "ripeness," and "mootness," which the Court has evolved . . . are but several manifestations . . . of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.

47. 312 U.S. 270 (1941).

the oft cited[48] test for the existence of a case or controversy:[49]

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, *between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*

Arguably, under a definition of case or controversy that requires two "adverse legal interests," there is a potential case or controversy whenever a state statute is challenged. *Poe v. Ullman*[50] nicely demonstrates this proposition and also points to the proper relationship between case or controversy and standing. In *Poe*, the plaintiffs, two married women with histories of abnormal pregnancies, as well as their doctor, brought suit for declaratory relief challenging the constitutionality of a state statute prohibiting advice on and the use of contraceptive devices. As an allegation of injury, plaintiffs contended that the State's Attorney, in the course of his public duty (being bound to prosecute violators of state law) would prosecute them.[51]

Relying on the language in *United Public Workers v. Mitchell*[52] pertaining to a hypothetical threat[53] and the fact that the statute had been in effect since 1879 without enforcement,[54]

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48. *E.g.*, Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1219 (1974); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972); Golden v. Zwickler, 394 U.S. 103, 108 (1969); Anderson v. Nemetz, 474 F.2d 814, 817 (9th Cir. 1973).

49. 312 U.S. at 273 (emphasis added).

50. 367 U.S. 497 (1961) (plurality opinion).

51. *Id.* at 501.

52. 330 U.S. 75 (1947).

53. *United Public Workers* was a suit against the federal government by federal employees seeking an injunction against future enforcement of the Hatch Act and a declaration that federal employees might engage in political activity. Responding to the threshold issue of whether a case or controversy was presented by those appellants who could only allege a desire to participate in political activities, the Court held that merely an advisory opinion was being sought inasmuch as

> [t]he power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of the judicial authority for their protection against actual interference. *A hypothetical threat is not enough.*

330 U.S. at 89-90 (emphasis added).

54. 367 U.S. at 501-02 (lack of enforcement due to more than prosecutory paralysis in light of continuous and notorious sales of contraceptives throughout the state).

the spokesman for the Court,[55] Mr. Justice Frankfurter, established the principle that[56]

> the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the state's prosecuting officials *if real threat of enforcement is wanting.*

Because the state had not shown any interest in enforcement of the anti-contraceptive statute, the plurality concluded no case or controversy was before the Court.[57]

By implication, if Connecticut had been enforcing the challenged statute, a potential case or controversy would have been presented.[58] The crucial inquiry then would become whether the particular plaintiffs had standing to raise the question. Therefore,

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55. The plurality opinion of Justice Frankfurter was joined by Justices Clark and Whittaker and by Chief Justice Warren. On ripeness grounds, Justice Brennan concurred, 367 U.S. at 509. Therefore, a majority of the Court disposed of *Poe* on grounds of justiciability.

56. 367 U.S. at 507 (emphasis added).

57. 367 U.S. at 505 n.9 (semble). The plurality opinion uses language that obscures the basis for decision. For example, standing may be the decision's basis. *Id.* at 503-04. On the point of case or controversy, the immediacy of the state's concern for the enforcement of the statute lends to a "ripeness" interpretation of the case. That is, the presence of a state statute provides a potentcial case only if the state's interest is ripe for adjudication. *See generally* HART & WECHSLER at 120-45; CURRIE at 46-50.

Epperson v. Arkansas, 393 U.S. 97 (1968), makes it clear that *Poe* represents a judicially imposed restriction on the constitutional potential of "case or controversy." In *Epperson*, the plaintiff-school teacher sought declaratory and injunctive relief against the validity of a 1928 state statute prohibiting the teaching of evolution. The Court, per Mr. Justice Fortas, held:

> There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life . . . . Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

Id. at 101-02. Curiously, the Court made no mention of *Poe*. In a concurring opinion, Justice Black mentioned his doubts on justiciability by pointing out that:

> Unfortunately, however, the State's languid interest in the case has not prompted it to keep this Court informed concerning facts that might easily justify dismissal of this alleged lawsuit as moot or *as lacking the quality of a genuine case or controversy.*

Id. at 110 (emphasis added). Perhaps *Epperson sub silentio* overruled the judicial limitations on case or controversy imposed by *Poe*. However, at least one inferior court seems to require some signs of active prosecution for the existence of a case or controversy, Cine-Com Theatres Eastern States, Inc. v. Lordi, 351 F. Supp. 42, 47 (D.N.J. 1972) (three judge court) (distinguishing *Poe* and granting declaratory relief). Further, the Court in *Steffel* resurrected the principles of *Poe* by noting: "The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical' *Poe v. Ullman*, 367 U.S. 497, 508 (1961)." ___ U.S. at ___, 94 S. Ct. at 1215-16.

unless the unusual *Poe* circumstances are present, the state's interest in the statute's enforcement would be immediate, the dual adversity would be present, and, assuming standing, the constitutionality of the state statute should be justiciable.[59]

Standing

On the issue of standing, the Supreme Court has evolved a two-prong enquiry. The primary question focuses on "whether the plaintiff alleges that the challenged action has caused him injury in fact."[60] Second, attention is drawn to "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[61]

The second requirement should present no problem to a finding of standing in the context of a prayer for a declaratory judgment on the constitutionality of a state statute. Under this standing requirement, the plaintiff need only point to some statutory or constitutional provision which "arguably" seeks to protect his interests. The Civil Rights Act of 1866[62] is such a statute in that it provides a cause of action to any party alleging deprivation of a constitutional right by the operation of any state statute.[63] This

58. *See* Cine-Com Theatres Eastern States, Inc. v. Lordi, 351 F. Supp. 42 (D.N.J. 1972) (reasonable basis to predict prosecutorial action). *Cf.* Steffel v. Thompson, ___ U.S. at ___, 94 S. Ct. at 1215-16.

59. When confronted with the justiciability of a prayer for a declaration concerning the constitutionality of a state statute or local ordinance, the lower federal courts have regarded the complainant's standing as dispositive of whether an actual case or controversy has been presented. Anderson v. Nemetz, 474 F.2d 814, 817-18 (9th Cir. 1973); Thoms v. Heffernan, 473 F.2d 478, 483-85 (2d Cir. 1973); Reed v. Giarrusso, 462 F.2d 706, 711 (5th Cir. 1972); Cooley v. Endictor, 340 F. Supp. 15, 18 (N.D. Ga. 1971), *aff'd*, 458 F.2d 513 (5th Cir. 1972) (per curiam); Wulp v. Corcoran, 454 F.2d 826, 830 (1st Cir. 1972); United Artists Corp. v. Proskin, 363 F. Supp. 406, 408 n.3 (N.D.N.Y. 1973); Doe v. Israel, 358 F. Supp. 1193, 1198 (D.R.I. 1973); Anderson v. Vaughn, 327 F. Supp. 101, 103 (D. Conn. 1971).

The Supreme Court's consideration of the question of justiciability in *Steffel* was also framed in terms of an examination of the petitioner's standing to challenge the constitutionality of the Georgia criminal trespass statute. ___ U.S. at ___, 94 S. Ct. at 1215-16.

60. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970).

61. *Id.* at 153.

62. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

63. See note 62 *supra*.

act, combined with a colorable constitutional claim, would be sufficient to bring the plaintiff within the "zone of interest" test in a suit for declaratory relief.

The more difficult standing problem is presented by the requirement for injury in fact: What type and degree of injury must be alleged for a particular plaintiff to have standing to question the constitutionality of a state statute. In affirming the traditional "requirement that a party seeking review must allege facts showing that he is himself adversely affected,"[64] the Court in *Sierra Club v. Morton*,[65] while noting the trend toward finding an attenuated injury to suffice for standing,[66] pointed out that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[67] Thus, the injury in fact aspect remains a vital element of the doctrine of standing.[68]

Analysis of what injury suffices to confer standing upon a party attacking a state statute on constitutional grounds must begin with *Dombrowski v. Pfister*.[69] Although state prosecution under the challenged statute had not been commenced at the time of the federal suit, *Dombrowski* held that the state's use of the statute to harass the federal court plaintiffs provided a sufficient basis to confer standing.[70] Notwithstanding the factual harassment, the Court was, arguably, seeking to expand the basis for standing in the context of a state statute challenged to be, "on its face," vague or overly broad in contravention of the first amendment. *Dombrowski* seemed to imply that the potential

64. Sierra Club v. Morton, 407 U.S. 727, 740 (1972).

65. 407 U.S. 727 (1972).

66. *Id.* at 738, citing to the development noted with approval in Association of Data Processing Service Organizations, Inc., 397 U.S. 150, 154 (1970).

67. *Sierra Club*, 407 U.S. at 738.

68. The view of standing as a measure of personal interest was more fully articulated in Flast v. Cohen, 392 U.S. 83 (1968), in which the Court, quoting from Baker v. Carr, 369 U.S. 186, 204 (1966), explained:

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Flast v. Cohen, 392 U.S. at 99. *Accord*, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Linda R.S. v. Richard D., 410 U.S. 614 (1973); *see generally* HART & WECHSLER at 150-214; CURRIE at 53-83.

69. 380 U.S. 479 (1965).

70. *Id.* at 487.

"chilling effect" of a facially unconstitutional statute upon the societal exercise of first amendment rights was sufficient injury, of itself, to provide standing for any party to challenge the statute.[71]

If such an expansive interpretation of *Dombrowski* ever were valid, *Younger v. Harris*[72] and *Boyle v. Landry*[73] made it clear that the injury requirement of standing was not to be so interpreted. *Younger* and *Boyle* limit standing to that plaintiff who, at a minimum, can demonstrate an indication, from the prosecutor or other appropriate state authority, which forms a reasonable basis for a prediction that an actual prosecution would result.[74] After

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71. Justice Brennan, writing for the Court in *Dombrowski*, contended:

> When the statutes . . . have an overbroad sweep . . . the hazard of loss or substantial impairment of . . . precious rights may be critical . . . . [W]e have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

Id. at 486 (dictum). The plaintiffs in *Dombrowski* had been personally threatened with enforcement of the challenged statutes. Hence, *Dombrowski* would have to be stretched to lend support to the proposition that one not so threatened could still challenge a state statute for overbreadth.

72. 401 U.S. 37 (1971).

73. 401 U.S. 77 (1971).

74. In *Younger*, a college professor, who taught leftist political doctrines, and two members of the Progressive Labor Party, who advocated peaceful change in industrial ownership and political processes, sought intervention to challenge the constitutionality of the California Criminal Syndicalism Act. None of the three intervenors had been threatened with prosecution under the statute but each contended that the presence of the Act, coupled with the prosecution of Harris, inhibited their activities and constituted a "chilling effect" upon first amendment rights. The district court, without requiring a showing of any danger of future prosecution, allowed intervention. Indeed, the court stated that such a showing would be irrelevant to the question of standing:

> We should like also to make clear that our decision in no way stems from any apprehension of our own that plaintiffs Dan, Hirsch or Broslawsky [the intevenors] stand in any danger of prosecution by the respondent . . . because of the activities that they ascribed to themselves in the complaint.

Harris v. Younger, 281 F. Supp. 507, 516 (C.D. Cal. 1968). The Supreme Court dismissed the complaint of the three intervenors and held that having failed to allege a threat of prosecution for the continued pursuit of their interests, there existed no acute, live controversy involving the intervenors, and, therefore, they were not "appropriate plaintiffs." Younger v. Harris, 401 U.S. at 42.

Similarly, in *Boyle* the Court reversed the district court and held that plaintiffs lacked standing to strike down an alleged vague criminal statute because no allegation was made of any threat of state prosecution against the federal plaintiffs. 401 U.S. at 80-81. This holding represented a rejection of the plaintiffs' claim of standing based entirely on the "chilling effect" of the statute on the exercise of first amendment rights. On this point, the Court said:

> [T]hose who originally brought this suit made a search of state statutes and city ordinances with a view of picking out certain ones that they thought might possibly be used by the authorities as devices for bad-faith prosecutions against them.

Id. at 81.

rejecting the standing of the three intervenors in *Younger*, who had not been threatened, to challenge the California Criminal Syndication Act on the basis of overbreadth, inhibition, and chilling effect on the exercise of first amendment rights,[75] Justice Black provided some guidance on the requisite injury for standing:[76]

> If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist.

While adhering to Justice Black's notion of personal detriment, decisions by the Supreme Court and inferior federal courts since the February sextet have expanded and confirmed his statement of when standing exists. In the recent abortion cases, *Roe v. Wade*[77] and *Doe v. Bolton*,[78] the Court accepted the proposition that actual or threatened prosecution under a specific statute provided sufficient injury in fact to confer standing upon a party to challenge that statute.[79] In *Doe* the Court further allowed standing to physicians who had not even been threatened with prosecution.[80] In theory, the Supreme Court accepted that the direct operation of a statute against a specific group, abortion doctors, conferred standing. Therefore, against these doctors, di-

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75. See note 74 *supra*.

76. 401 U.S. at 42 (dictum). It should be noted that the language of *Younger* and *Boyle* does not preclude standing absent a *formal* threat of prosecution. These cases do, however, require, as a minimum, some showing that the federal court plaintiff's alleged fear of future prosecution is grounded in reason rather than pure fantasy. *See* Note, *Implications of the* Younger *Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874, 893-94 (1972).

77. 410 U.S. 113 (1973).

78. 410 U.S. 179 (1973).

79. *Id.* at 188.

80. Inasmuch as Doe and her class are recognized, the question of whether the other appellants—physicians. . .—present a justiciable controversy and have standing is perhaps a matter of no great consequences. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Doe v. Bolton, 410 U.S. at 188.

rect personal detriment was posed only by the statute they attacked.[81]

On the necessity of deterrence as a basis for standing, *Roe* and *Doe* adopt a middle ground between *Dombrowski* and *Younger*. A mere "chilling effect" of an overbroad statute fails to confer standing unless either the plaintiff has been personally threatened with prosecution or belongs to a class against whom the challenged statute directly operates. In either situation, personal deterrence is present.[82]

While *Doe* indicates that it is possible for a party to have standing, absent some personal threat of enforcement of the statute, that type of standing should not often occur. In conferring standing upon the physicians, the Court carefully emphasized that it was the physicians "against whom these criminal statutes

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81. See note 80 *supra*.

82. This line drawing of personal deterrence as the minimal injury for standing enables one to have the constitutionality of the statute determined without subjecting himself to the imposition of criminal sanctions. Apparently, beginning with ex parte Young, 209 U.S. 123 (1908) (articulating the power of the federal courts to enjoin the unconstitutional acts of state officials), the Court has indicated that standing is not predicated upon exposure to the criminal penalties of a statute. *Young* emphatically rejected the state's argument that it was necessary for the plaintiffs to follow a sequence of first disobeying the state law and *then* presenting their constitutional claims as a defense to a state criminal trial. *Id.* at 165. Rejection of such an argument also underlay the injunctive relief granted in Terrace v. Thompson, 263 U.S. 197 (1923). The plaintiff in *Terrace*, a citizen of the United States, owned certain agricultural lands in Washington which he desired to lease to a Japanese subject. The lease would have been executed but for the state anti-alien land law under which the Washington Attorney General threatened criminal charges if the transaction were completed. Plaintiffs sued in the federal district court to enjoin future imposition of the land law, alleged to be violative of the due process and equal protection clauses of the fourteenth amendment. The Supreme Court reversed the district court's grant of the state's motions to dismiss. The Court, per Justice Butler, held federal injunctive relief to be available if the state law is found to be unconstitutional, because the plaintiffs "are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure adjudication of their rights." *Id.* at 216. *Accord*, Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925).

The continuing vitality of the principle that a party is not required to expose himself to criminal sanctions to obtain adjudication of alleged constitutional rights is demonstrated by Evers v. Dwyer, 358 U.S. 202 (1958). In that case, the appellant, a Negro, refused to comply with a municipal bus driver's order, pursuant to a Tennessee statute, that he move to the rear of the vehicle. The driver then requested the aid of two policemen who instructed the appellant to move to the rear or to get off the bus. Appellant departed the bus. Proceedings were instituted in federal district court for declaratory and injunctive relief based upon the claimed unconstitutionality of the Tennessee bus statute. A three-judge district court dismissed the complaint for failure to present an "actual controvery" within the meaning of the Declaratory Judgment Act. The Supreme Court, in a per curiam opinion, reversed and held the appellant to have standing to contest the validity of the bus statute:

We do not believe that appellant, in order to demonstrate the existence of an

[the abortion statutes] directly operate[d] . . . ."[83] In the typical situation where a party seeks to contest the validity of a statute as impinging upon rights secured by the Constitution, the dictum of Justice Black in *Younger* supplies the more appropriate test: The "injury in fact" requirement of standing is satisfied by an allegation of personal deterrence. It may be substantiated by a showing of a predictive basis of enforcement of the questionable statute against the particular plaintiff.

Although not considering in detail the relationship between injury and standing, the Court moved towards this rationale in *Steffel v. Thompson*.[84] Relying upon the fact that the petitioner has been "twice warned to stop handbilling . . . and [had] been told by the police that, if he again handbills . . . and disobeys a warning to stop, he will likely be prosecuted,"[85] the Court found sufficient deterrent injury for standing to challenge the Georgia statute under which the petitioner was warned.[86] In so holding, the Court appeared to formulate the injury required for standing in terms of whether "a federal plaintiff demonstrates a *genuine* threat of enforcement of a disputed state criminal statute . . . ."[87]

The conclusion to be drawn is that, in the context of a suit for a federal declaratory judgment regarding the constitutionality of a state statute, justiciability[88] requires that the state statute be

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"actual controversy" over the validity of the [Tennessee] statute here challenged, *was bound to continue to ride the Memphis buses at the risk of arrest if he refused* to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disability necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability.

358 U.S. at 204 (emphasis added). *Accord*, Epperson v. Arkansas, 393 U.S. 97 (1968); Perez v. Ledesma, 401 U.S. 82, 93 (1971) (separate opinion by Brennan, J.).

83. 410 U.S. at 188. See note 80 *supra*.

84. ___ U.S. ___, 94 S. Ct. 1209 (1974).

85. *Id.* at ___, 94 S. Ct. at 1215.

86. *Id.*

87. *Id.* at ___, 94 S. Ct. at 1223-24 (emphasis added).

88. A final issue relating to the concept of justiciability is that of mootness, as articulated in Golden v. Zwickler, 394 U.S. 103 (1969). There, the complainant was seeking a declaration that a New York statute, making criminal the anonymous distribution of election handbills, was constitutionally invalid. Standing was premised upon the state's prohibition, pursuant to the challenged statute, of Zwickler's distribution of handbills relating to the voting record of a particular United States Congressman. During the pendency of the litigation, the specific Congressman had left the Congress to accept an appointment to the New York Supreme Court. Notwithstanding this change in circumstances, the district court held Zwickler entitled to declaratory relief, Zwickler v. Koota, 290 F. Supp. 244, 248-49 (E.D.N.Y. 1968). The Supreme Court reversing reasoned that, because of his status as a member of the Supreme Court of New York, the Congressman would most likely not be a candidate for office again. Since Zwickler's sole concern was

one which the state does have a present interest in enforcing and that there exist a "genuine threat of enforcement" of the statute against the federal court plaintiff. Thus, the plaintiff's standing to raise the constitutional issue is sustained by the state's legitimate and active interest in the enforcement of its laws. Such a direct relationship compels the result that a grant of federal relief will, to some degree, cause a disruption in state procedures. Indeed, once justiciability is present, the good faith interest of the state in enforcing its own laws can increase in direct proportion to the federal interest in ensuring that the state law does not impinge upon a federally secured right. The doctrine of comity, which allows a federal court to examine the propriety of federal relief, is one method the Supreme Court has developed to minimize the conflict of these competing state and federal interests.

THE PROPRIETY OF FEDERAL DECLARATORY RELIEF

Samuels v. Mackell, the second decision of the *Younger* sextet, provides the principal enunciation of the standard for the propriety of declaratory relief. In the context of a pending state prosecution against the federal plaintiff, the *Samuels* Court stated the issue to be "whether under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate."[89]

In considering this question, the Court, per Justice Black, made two fundamental observations regarding declaratory relief. Contrary to prior recognition of the declaratory judgment as essentially a hybrid of law and equity,[90] Justice Black first characterized the declaratory procedure as equitable in nature;[91] he then

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with the right to distribute handbills pertaining to the voting record of this particular Congressman, the question of the constitutionality of the New York statute was held to have been mooted by subsequent events. Zwickler v. Golden, 394 U.S. at 109-10.

A similar problem of mootness was alluded to in *Steffel* where the Supreme Court expressed doubts "as to the *continuing* existence of a live and acute controversy . . . ." ___ U.S. at ___, 94 S. Ct. at 1216. The basis for such doubts was Steffel's complaint which indicated that "his handbilling activities were directed 'against the war in Vietnam and the United States foreign policy in Southeast Asia.' " *Id.* at ___, 94 S. Ct. at 1216. Cognizant of the recent developments pertaining to United States involvement in Southeast Asia, the Court remanded to the district court "to determine if subsequent events have so altered petitioner's desire to engage in handbilling" as to moot the challenge to the constitutionality of the Georgia statute. *Id.*

89. 401 U.S. 66, 69 (1971).

90. See S. Rep. No. 1005, 73d Cong., 2d Sess. 6 (1934) which notes that "the [declaratory] procedure is neither distinctly in law nor in equity, but sui generis . . . ."

91. 401 U.S. at 69-72. To obtain this characterization, heavy reliance was placed upon the Court's earlier reasoning in Great Lakes Co. v. Huffman, 319 U.S. 293 (1943), which referred to a suit for a declaratory judgment as "essentially an equitable cause of

noted that "principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long standing policy limiting injunctions was designed to avoid."[92] In consequence of this reasoning, the Court held:[93]

> [I]n cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the priority of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Samuels establishes the narrow principle that where the state is proceeding, in a pending criminal case, against the federal plaintiff, the disruptive effects on such state proceedings of a declaratory judgment are deemed equivalent to those of an injunction. Therefore, the propriety of declaratory relief must be determined in accordance with the equitable standard of irreparable injury[94] applicable to injunctive relief.[95]

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action," and "analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title." *Id.* at 300. *Great Lakes* is distinguishable from the question presented in *Samuels* in that it dealt with the specific problem of a federal declaratory judgment relative to the collection of state taxes rather than a state criminal prosecution. Justice Black condeded this distinction, but "preceive[d] no relevant difference between the two situations . . . ." 401 U.S. at 71-72.

The characterization of the declaratory judgment as an equitable remedy and, therefore, subject to the equitable requirement of irreparable harm is not particularly material to the *Samuels* equation of injunctive and declaratory relief. To the extent that a declaratory judgment can be said to be an equitable remedy, the equation is made that much more reasonable. However, the decisive rationale of *Samuels* is that comity mandated that the standards for injunctive and declaratory relief be equated.

92. 401 U.S. at 72.

93. *Id.* at 73. The equitable notions to which Justice Black referred were articulated, in the context of a prayer for injunctive relief, in *Younger v. Harris*:

> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, *when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied injunctive relief.*

401 U.S. at 43-44 (emphasis added).

94. Ex parte Young, 209 U.S. 123 (1908) clearly established the power of federal courts to enjoin a state official from future prosecution of the federal complainant under an unconstitutional statute; but it was left to subsequent cases to embellish upon the circumstances required for the issuance of the injunction. Fenner v. Boykin, 271 U.S. 240 (1926) (suit brought in federal district court to enjoin commencement of a state prosecution under a Georgia statute alleged to be in conflict with the commerce clause of the

Implicit in the *Samuels* equation of declaratory and injunctive relief is the concept of "Our Federalism," the expression for the balance between the state and federal judicial systems effec-

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constitution), provided a comprehensive statement of the elements necessary for federal injunctive relief:

> *Ex parte* Young . . . and following cases have established the doctrine that where absolutely necessary for the protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500.

Id. at 243-44. *Accord*, Williams v. Miller, 317 U.S. 599 (1942) (per curiam); Watson v. Buck, 313 U.S. 387, 400-01 (1941) (Federal injunctions against enforcement of state criminal statutes "are not to be granted as a matter of course, even if such statutes are unconstitutional"); Beal v. Missouri Pacific R.R. Corp., 312 U.S. 45, 49-50 (1941) (The Court required a "clear showing that an injuntion is necessary in order to prevent irreparable injury . . . [in order that] scrupulous regard [might be had] for the rightful independence of state governments. . . ."); Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935); Cline v. Frink Dairy Co., 274 U.S. 445, 452 (1927). *See generally*, Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski* 48 TEXAS L. REV. 535 (1970).

The heavy emphasis placed upon *Fenner* by Justice Black in Younger v. Harris, 401 U.S. at 46, indicates the continuing vitality of *Fenner* for formulating the standards of injunctive relief, both in the pending and non-pending circumstances. *See, e.g.*, Rakes v. Coleman, 359 F. Supp. 370, 374-75 (E.D. Va. 1973).

95. Traditionally, the equitable standard of irreparable injury has not been regarded as essential to the issuance of a declaratory judgment. In Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), the Court specifically rejected the argument that irreparable injury was an element of declaratory relief:

> Where there is . . . a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function [referring to a declaratory judgment] may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. . . . and as it is not essential to the exercise of the judicial power that an injunction be sought, *allegations that irreparable injury is threatened are not required.*

Id. at 241 (emphasis added) (citations omitted).

Samuels does not explicitly set forth irreparable injury as a requirement for a declaratory judgment, but rather, by equating the propriety of injunctive and declaratory relief, incorporates the standards for an injunction enunciated in *Younger*. Samuels v. Mackell, 401 U.S. at 73. Relying on Fenner v. Boykin, 271 U.S. 240 (1926), and its progeny, the Court in *Younger* held a showing of irreparable injury to be essential to the enjoining by a federal court of pending state court proceedings:

> In all of these cases the Court stressed the importance of showing irreparable

tuated by comity in *Younger*.[96] By characterizing the disruptive effects of a declaratory judgment as "precisely the same" as those of an injunction, Justice Black accentuated the state half of the equipose of comity. This recognized the state interest in the orderly administration, free from extrinsic interference, of its criminal process. Premising the denial of declaratory relief was the finding that the emphasized state interest outweighed the inter-

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injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." Fenner, *supra*. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Younger v. Harris, 401 U.S. at 46.

Younger further provided a synopsis of three situations which constitute irreparable harm: (1) bad faith harassment as formulated in Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965); (2) the extraordinary circumstances where a state statute or ordinance is "'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" Younger v. Harris, 401 U.S. at 53-54, quoting Watson v. Buck, 313 U.S. 387, 402 (1941); (3) a situation where the threat to a plaintiff's federally protected rights can not be eliminated by his defending in single state prosecution. Younger v. Harris, 401 U.S. at 46. *See* Carey, *Federal Court Intervention in State Criminal Prosecutions*, 56 MASS. L.Q. 11, 20-26 (1971).

96. The final justification provided in *Samuels* for the equation of the two forms of relief was the "basic policy against federal interference with pending state criminal prosecutions." 401 U.S. at 73. This principle was more fully developed in *Younger* where the Court said:

> [The] underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests, of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. at 44-45.

est of the national government, "anxious though it may be to vindicate and protect federal rights."[97]

While the result in *Samuels* is eminently acceptable[98]—the federal interest in vindicating federal rights can be presumed satisfied because of the duty of a state court to vindicate those rights—the extension of its reasoning process to the non-pending situation can produce an unsatisfactory result. That is, the federal interest may not be satisfied when the state will not provide a forum for the vindication of federal rights. An analysis based upon a comparison of the disruptive effects of declaratory and injunctive relief is a proper starting point, but it is not decisive. While declaratory relief may be disruptive of the state administration of justice, the question is whether the federal interest justifies that disruption. Put another way, an analysis of dispositive disruptive effects begs the question because it focuses only on the state interest that comity must balance.

State and Federal Interests: Justice Black's Focus on the State Interest

In *Samuels*, Justice Black advanced two arguments to support the proposition that the disruptive effects of the two forms of relief are "precisely the same":[99]

> In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "[f]urther necessary or proper relief," 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings.[100] Secondly,

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97. *Id.* at 44. See note 95 *supra* regarding the *Samuels* adoption of the *Younger* principles of comity.

98. In the pending situation this result conforms to the practical conclusion that it makes no sense to stop a state criminal trial in mid-stream. The state defendant (federal court plaintiff) is presumed to be assured of an adequate opportunity to present any constitutional claims he may have to the state tribunal.

The *Samuels* result caused little controversy within the Court. Although Justice Black, writing the majority opinion, wrote only for four other Justices, the Court was unanimous in the result. Eight members of the Court agreed that, absent the equitable requirements for injunctive relief, a declaratory judgment should be regarded as inappropriate in the pending situation. Justice Douglas also concurred in the result, but on the grounds of abstention rather than lack of equity. 401 U.S. at 74-75.

99. 401 U.S. at 72.

100. Justice Black's first argument for equating the disruptive effects of the declaratory and injunctive remedies, that a declaratory judgment might provide the basis for a

even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would.

The problem with this reasoning is that the implications of the justification for the conclusion are broader than the conclusion itself.[101] The equation of the intrusive effects of the two forms

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subsequent injunction, while plausible at the time, appears now to be diminished in vitality in consequence of the Court's later opinion in Mitchum v. Foster, 407 U.S. 225 (1972). If comity may be judicially superimposed on the "expressly authorized" exception to 28 U.S.C. § 2283 (1970) (the Anti-injunction Statute), (see note 3 *supra*) there would seem to be no reason for not imposing comity upon the "protect or effectuate its judgments" exception.

The scenario would arise if a federal court declared a state statute unconstitutional and state officials ignored the declaration by subsequently indicting the plaintiff; if plaintiff sought further aid, *i.e.*, an injunction, of the federal court, the issue would be presented. Despite the provisions of 28 U.S.C. §§ 2202 and 2283 (1970), *Mitchum* indicatesthat the issuance of an injunction under these circumstances is not as perfunctory as Justice Black suggested. Comity, an orderly balance between federal and state judicial power, may preclude the federal court from granting further relief framed in injunctive form.

This question is explored by Justice Rehnquist in Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1225 (1974) (concurring opinion). Through an examination of the nature and effect of a declaratory judgment, he concludes:

> [There are] critical distinctions which make declaratory relief appropriate where injunctive relief would not be. It would all but totally obscure these important distinctions if a successful application for declaratory relief came to be regarded, not as the conclusion of a lawsuit, but as a giant step towards obtaining an injunction against a subsequent criminal prosecution. The availability of injunctive relief must be considered with an eye toward the important policies of federalism which this Court has often recognized.

Id. at ___, 94 S. Ct. at 1226-27.

Justice White, reacting to this conclusion, states that in his view there may be instances where "it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments." *Id.* at ___, 94 S. Ct. at 1225 (concurring opinion). To the extent that Justice Rehnquist is merely advancing the argument that notions of comity are relevant to the subsequent issuance of a federal injunction as "further relief" under the Declaratory Judgments Act, Justice White's position is not necessarily in conflict.

The point to be made is that Justice Black's most persuasive argument in *Samuels* for the equation of the disruptive effects of a declaratory judgment and an injunction is his second contention that the "practical impact" of the two forms of relief is virtually identical.

101. *E.g.*, Rakes v. Coleman, 359 F. Supp. 370 (E.D. Va. 1973). Of particular interest is the approach taken by Judge Smith in Cooley v. Endictor, 340 F. Supp. 15 (N.D. Ga. 1971), *aff'd* 458 F.2d 513 (5th Cir. 1972) (per curiam), where he extended bodily the *Samuels* rationale to a non-pending situation. In *Cooley*, plaintiffs brought a class action seeking declaratory and injunctive relief against the Georgia indecent exposure statute. None of the plaintiffs had been charged with violating the statute, but Cooley had been told that, unless he removed certain objectionable scenes from the play he was producing, the state would institute proceedings against him. Cooley deleted the specific scenes and then commenced suit alleging that he desired to reinstate the scenes. Plaintiffs first argued that *Younger* did not apply because no state prosecution was pending. The district

of federal relief was limited factually[102] and by the verbiage of the Court[103] to the pending situation. But the viability of the reasoning to sustain the equation does not appear to be so restricted. The pendency or non-pendency of state proceedings, while significant in the determining of the degree of disruption of the state judicial process caused by the federal relief, would not appear to be dispositive of whether "the declaratory relief alone has virtually the same practical impact as a formal injunction . . . ."[104]

Regardless of whether state criminal proceedings are pending or non-pending, the practical impact of a federal judgment declaring a state statute unconstitutional could be substantially the same as an injunction. In practical terms, "voluntary compliance with the orders of federal courts is the norm and desideratum, and this is as true of declaratory judgments as of injunctive orders."[105]

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court, while assuming this contention to be correct, nevertheless denied injunctive relief because of the lack of irreparable harm. 340 F. Supp. at 19. In considering the request for a declaratory judgment, the court noted that while *Samuels* did not technically apply to the situation where no state prosecution was pending, Justice Black's reasoning was persuasive, *id.* at 19-20, and declaratory relief was improper:

> To allow declaratory relief without requiring a showing of bad faith might well lead to circumvention of that requirement for injunctions as well. Second, even if a declaratory judgment does not lead to the issuance of an injunction, the former is no less disruptive of the state's criminal processes than the latter.

Id. at 19-20.

Ample case law authority supports the *Cooley* court's denial of injunctive relief. Dombrowski v. Pfister, 380 U.S. 479 (1965); Douglas v. City of Jeanette, 319 U.S. 157 (1943); Williams v. Miller, 317 U.S. 599 (1942); Watson v. Buck, 313 U.S. 387 (1941); and Fenner v. Boykin, 271 U.S. 240 (1926)—all support the proposition that irreparable injury is required before a federal court may enjoin a non-pending state criminal suit.

If declaratory relief cannot be distinguished from injunctive relief, logic compels its denial unless irreparable injury is demonstrated, see text accompanying notes 117-22 *infra*.

102. Each of the appellants in *Samuels* had been indicted in New York state court on charges of criminal anarchy prior to the filing of the federal action challenging the constitutionality of the state statute under which the indictments had been returned.

103. In formulating the equation of the effects of a declaratory judgment and an injunction, the Court continually made reference to the pendency of state proceedings. 401 U.S. at 72, 73.

104. *Id.* at 72.

105. A.L.I. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1243, at 323 (1969). See Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 17-19 (1964). The "voluntary" aspect of a state court's compliance with a federal declaratory judgment does provide some basis for distinguishing between a declaratory judgment and an injunction. The latter is a more coercive remedy, enforceable by judicial contempt proceedings. It is this distinction of the degree of coercion that provides a basis for differentiating between injunctive and declaratory relief in the context of the three-judge court requirement. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). *But see* Currie, *The Three-Judge District Court in Consti-*

In legal terms, the nub of the question may, perhaps, be whether a declaratory judgment bars the state prosecutor from indicting the victorious federal plaintiff in state court. This issue, the collateral estoppel effects of a declaratory judgment,[106] has not been decided by the Supreme Court.[107]

If the declaratory judgment does not bar renewed prosecution in a state court,[108] then the federal opinion allows the office of the state prosecutor time to reconsider prosecution under the statute and may allow the legislature time to enact a new statute.[109] Under this analysis, a decision to continue prosecution against the federal plaintiff must be considered in good faith: If

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tutional Litigation, 32 U. CHI. L. REV. 1, 18-20 (1964) (proposing that the three-judge court requirement be extended to include a prayer for declaratory relief).

Nevertheless, Justice Black would appear to be correct that the "practical impact" of the declaratory and injunctive forms of relief is similar, regardless of the coercive nature. The form of the relief granted in the two abortion cases, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), is indicative of the Supreme Court's approval of this proposition. In both instances the federal complainant was seeking injunctive and declaratory relief against state abortion statutes on constitutional grounds. The district court in *Doe*, conceding that no state prosecutions were pending, nevertheless, denied the request for injunctive relief on the same basis as such a prayer would be denied were a state proceeding in progress:

> ". . . [T]he vindication of the defendant's federal rights is left to the state courts except in the rare situation where it can be clearly predicted . . . that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Doe v. Bolton, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (quoting City of Greenwood v. Peacock, 384 U.S. 808, 828 (1968). The district court, however, did declare the Georgia statute to be unconstitutional. *Id.* at 1055. The same result was obtained by the district court in Roe v. Wade, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970). The Supreme Court affirmed both judgments without consideration of the denial of injunctive relief. The Court noted that, inasmuch as the statutes had been declared unconstitutional, consideration of the request for injunctive relief was unnecessary because of the presumption that the States' prosecutorial authorities would give full credence to the declaratory judgment. *Roe*, 410 U.S. at 166; *Doe*, 410 U.S. at 201.

Thus, although a declaratory judgment may not be of a coercive nature, the Court was ready to accept, without consideration, the district courts' denials of injunctive relief on the basis of the assumption that the declaration against the statutes would effect the same result in securing the complainant's constitutional rights as an injunction.

106. HART & WECHSLER at 1048.

107. In Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974), the majority expressed no view on this issue. In a concurring opinion, Justice White anticipated that declaratory relief would have res judicata effects, *id.* at ___, 94 S. Ct. at 1225, but Justice Rehnquist, in a concurring opinion joined by the Chief Justice, strongly indicated the opposite view, *id.* at ___, 94 S. Ct. at 1227.

108. *See* note 100 *supra*. If the *Mitchum* obstacle is overcome, declaratory relief would always be supplemented by an injunction. Thus, the two forms of relief are as indistinguishable in the nonpending situation as they are in the pending.

109. Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1225 (1974) (Rehnquist, J. concurring). See Perez v. Ledesma, 401 U.S. 82, 124-26 (Brennan, J., separate opinion).

continued prosecution were considered bad faith harassment, then the federal court plaintiff would be entitled to injunctive relief under *Younger* and *Dombrowski* principles. In this situation, the two forms of relief would produce the "same practical effect."

Existing case law, which is not yet fully developed, suggests another line of analysis. As between the federal court plaintiff or plaintiffs[110] and the individual state prosecutor, federal declaratory relief has an estoppel by judgment[111] effect which binds the state courts.[112] This conclusion was reached by the Third Circuit in *Y.W.C.A. v. Kugler*[113] in which the principle issue was the impact of a federal declaratory judgment on the New Jersey judiciary. A three-judge district court, under non-pending circumstances, had denied a prayer for injunctive relief, but had declared the New Jersey abortion statute to be unconstitutional.[114] The Attorney General of New Jersey then appealed to the court of appeals and requested a stay of the district court declaration. The Third Circuit in denying the stay held:[115]

> [T]he declaratory judgment is binding only between these seven individual physician plaintiffs and the defendant appellant. Between the State of New Jersey and any other persons the opinion of the three-judge district court has only stare decisis effect to be weighed against conflicting opinions in the New Jersey Courts.

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110. See note 161, *infra*, for discussion of the severability of the claims of various federal court plaintiffs.

111. In the federal suit the threatened individual is the plaintiff and the state prosecutor is the defendant. If the state then attempted to prosecute the individual under a statute declared unconstitutional by the federal court, the positions of the parties would be reversed. The federal plaintiff would become the state defendant. However, the state, not the state prosecutor, would be the "plaintiff". In such a case, the individual would assert the prior federal judgment as a bar to the prosecution under the doctrine of collateral estoppel and not under the principle of res judicata.

112. Conceivably a state court might never decide this issue. Assume that after a favorable declaratory judgment, the federal plaintiff is indicted for the same conduct by the state. If the federal plaintiff immediately seeks a federal injunction, for the federal court to deny that relief and thereby preserve the issue for the state court, the federal court would have to find comity a bar, see note 100 *supra*, and to analogize to Douglas v. City of Jeannette, 319 U.S. 157 (1943) (refusing to enjoin state prosecution against one plaintiff even though, on behalf of an unrelated plaintiff, the Court declared the identical state statute unconstitutional the same day).

113. 463 F.2d 203 (3d Cir. 1972) (per curiam). *Compare with* Steffel v. Thompson, ___ U.S. ___, ___ n.3, 94 S. Ct. 1209, 1227 n.3 (1974) (Rehnquist, J., concurring).

114. Y.W.C.A. v. Kugler, 342 F. Supp. 1048, 1060 (D.N.J. 1972).

115. 463 F.2d at 204. *Accord*, Cine-Com Theatres Eastern States, Inc. v. Lordi, 351 F. Supp. 42, 51 n.5 (D.N.J. 1972).

This conclusion is consistent with the prior Supreme Court opinion in *Public Service Commission v. Wycoff Co.*[116] which, although factually distinguishable, implies that a federal declaration against the constitutionality of a state statute would have to have res judicata effect in order to avoid the pitfall of an advisory opinion.[117]

A weak argument can be made that a declaratory judgment with res judicata effect only between the federal court parties leaves the *state* free to reassess its position toward prosecuting the federal plaintiff in state courts for the same offense. Several considerations militate against such an argument. First, the argument as a matter of practice would render the declaratory judgment an advisory opinion. Second, it would be rare[118] for another prosecutor from the same office to indict the plaintiff. As such, the temptation for a federal court to issue injunctive relief on the grounds of bad faith would be hard to overcome. Third, if the individual defendant were the state's attorney general, as in *Younger*, it might be an easy construction to hold that all who prosecute through him are similarly barred by the federal judgment.[119]

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116. 344 U.S. 237 (1952).

117. *Wycoff* involved a challenge to the regulatory authority of the Public Service Commission of Utah. The complainant, engaging in the transportation of motion picture film and newsreels between points in Utah, requested a federal declaratory judgment that such activity was sufficiently within the flow of interstate commerce to be beyond the scope of the Commission's regulatory powers. *Id.* at 239. In denying the relief prayed for, the Court considered the potential impact of a federal declaratory judgment upon the Commission:

> Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If, not, the federal judgment serves no useful purpose as a final determination of rights.

Id. at 247. *See* HART & WECHSLER at 1048.

118. Voluntary compliance is the norm, see note 105 *supra*.

119. If the case reached state court, see note 112 *supra*, the federal court plaintiff, now the state defendant, should be able to estop the state, see Coca Cola v. Pepsi Cola, 36 Del. 124, 172 A. 260 (Del. Super. 1934) (defensive use of collateral estoppel).

If the federal court plaintiff returned to federal court for an injunction, the prior decision should form the basis for that relief, Steffel v. Thompson, ___ U.S. ___, ___ n.3, 94 S. Ct. 1209, 1227 n.3 (1974) (Rehnquist, J. concurring). However, even if Younger v. Harris, 401 U.S. 37 (1971) does not bar that relief, an application of the reasoning in Mitchum v. Foster, 407 U.S. 225 (1972) might, see note 99 *supra*.

If the state threatened an individual, not a party to a prior federal case for declaratory relief which vindicated another individual's rights, under the same statute, and he went to federal court for relief, then the *Pepsi* doctrine would allow the court to estop the state from contesting the constitutionality of the statute. Indeed, under Justice Rehnquist's views of *stare decisis*, *supra*, the prior decision most likely would be dispositive even if the state were not estopped.

As a matter of "practical impact,"[120] a declaratory judgment, regarded as being res judicata for the federal parties, arguably, is not significantly different from a narrowly drawn injunction restraining state prosecution against only the federal plaintiff(s).[121] Thus, if the disruptive effects of a declaratory judgment and an injunction are to be equated because, as Justice Black says, of the similarity in the "practical impact" of the two forms of relief, the scope of the equation is not dependent upon the pendency or non-pendency of state proceedings. The broad implication of this conclusion is that the propriety of a federal declaratory judgment regarding the constitutionality of a state statute is *always* to be determined in accordance with the equitable principle of irreparable injury, requisite to the issuance of a federal injunction.[122]

In this hypothetical, a decision to grant relief would present an interesting problem. In Douglas v. City of Jeannette, 319 U.S. 157 (1943), the Court refused to enjoin threatened state criminal prosecution of the complainant even though on the same day, on behest of another party, the Court had declared that statute unconstitutional. The Court reasoned: "[W]e can [not] assume that [the state] will not acquiesce in the decision of this Court holding the challenged ordinance unconstitutional . . . ." *Id.* at 165. When the Supreme Court speaks, state courts are bound, *e.g.*, Franklin v. State, 264 Md. 62, 285 A.2d 616 (1972). However, if, as Justice Rehnquist believes, an inferior federal court's decision on a federal question would not bind the state courts, Steffel, ___ U.S. at ___ n.3, 94 S. Ct. at 1227 n.3, then *Douglas* would be distinguishable and relief should, therefore, issue.

Note that under this conclusion, the declaratory judgment would have as devastating an impact upon the state administration of justice as an injunction. If, however, a decision of an inferior federal court does bind the state courts under a reverse of Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938), see note 122 *infra*, then *Douglas* would not be distinguishable. Relief should not issue. But, if *Steffel* mandates declaratory relief to the new plaintiff in the non-pending situation, then *Douglas* would be *sub silentio* overruled and there would be relief. Note that again declaratory relief would have the same practical effect as an injunction.

120. There still remains the difference in degree of coercion between a declaratory judgment and an injunction, but such a distinction should be immaterial to the "practical impact" of the remedies. See note 105 *supra*.

121. The scope of the injunctive decree granted in Dombrowski v. Pfister, 380 U.S. 479 (1965), indicates that it is possible for a federal court to frame an injunction with such narrow specificity as to apply only to the federal court parties. The Supreme Court's instructions to the district court on remand in *Dombrowski* included:

> [A] prompt framing of a decree restraining prosecution of the pending indictments against the individual appellants . . . and prohibiting further acts enforcing the sections of the Subversive Activities and Communist Control law here found void on their face.

Id. at 497-98. Thus, although the Court ultimately prohibited any enforcement of the unconstitutional portions of the statute, the initial impact of the injunction was framed in terms of the federal parties. The state was specifically enjoined from invoking the statute for further proceedings against the appellants. There is no reason to suppose that the scope of the injunction could not have been limited to that narrow point. *See* HART & WECHSLER at 1048.

122. See note 101 *supra*.

Thus far the practical effects of narrowly drawn injunction have been compared with

Justice Brennan's Definition of the Federal Interest

Cognizant of the argument that the rationale of *Samuels* surpasses the pending limitation, Justice Brennan authored a separate opinion in *Perez v. Ledesma*[123] to dispel such breadth. The crux of Justice Brennan's position was that[124]

> the Court's statement today in *Samuels v. Mackell*, that in cases where the state criminal prosecution is pending, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration . . . in determining whether to issue a declaratory judgment, and that

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and found indistinguishable from those of a declaratory judgment when, for example, another state prosecutor indicts the victorious federal court plaintiff.

It might well be argued that a broadly drawn injunction prohibiting any state prosecution under a state statute is clearly more disruptive of state administration of justice than declaratory relief. Thus, such an injunction would prevent state prosecution of other violators of the state law, an effect which declaratory relief, even if res judicata, may of itself lack.

Against this distinction is an argument, only broadly sketched here, that has not found favor with the courts. *See, e.g.*, Kraus v. Bd. of Educ. of City of Jennings, 492 S.W.2d 783 (Mo. 1973); Franklin v. State, 264 Md. 62, 285 A.2d 616 (1972). This disfavored argument asserts that a federal judgment on a federal question binds, in a reverse of Erie R.R. Co. v. Tomkins, 304 U.S. 64 (1938), through the supremacy clause, U.S. CONST. art. VI, the highest court of a state to the result in the same manner as the United States Supreme Court would be bound by a decision on state law by an inferior state court.

In support of this argument, consider if Congress could pass a statute making federal question jurisdiction exclusive except where all of the suitors are citizens of the forum state. If the answer is yes, note that the mirror image of diversity jurisdiction is created. A distinction, however, exists. The Constitution presumes state courts as competent as federal courts in deciding federal questions. *E.g.*, Robb v. Connolly, 111 U.S. 624,637 (1884) (quoted with approval in Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1216 (1974). In contrast, over state questions, federal jurisdiction is constitutionally limited by diversity requirements. Thus, on a constitutional level, the full concurrent jurisdiction of the state courts argues against a reverse *Erie* principle. *See* YWCA v. Kugler, 463 F.2d 203, 204 (3d Cir. 1972) (federal decision on federal question before a state court to be considered with other state decisions on the same question by a state court).

Against the concurrent jurisdiction argument is federal habeas corpus review of state convictions, *e.g.*, Fay v. Noia, 372 U.S. 391 (1963). *See generally* HART & WECHSLER at 1477 ("Does a conviction which was constitutional when obtained turn into an unconstitutional detention if there is a change in governing constitutional law?"). Federal habeas corpus review militates against the presumption of equal competency among the courts of the states and the inferior federal courts. The latter can review de novo constitutional claims presented to and decided by the state courts, Baker v. State, 15 Md. App. 73, 289 A.2d 348 (1972), reviewed on habeas and release ordered on constitutional issue, Whitfield v. Warden, 355 F. Supp. 972 (D. Md. 1973), *rev'd*, 486 F.2d 1118 (4th Cir. 1973). If today, because of the Constitutional prohibition of suspension of habeas corpus, U.S. CONST. art. I, § 9, Congress could not pass a statute eliminating all federal habeas review of state court convictions except as to state court jurisdiction, then the concurrent jurisdiction argument should fail. The *Erie* reverse should be valid.

123. 401 U.S. 82, 93 (1971).

124. *Id.* at 122.

where an injunction would be impermissible . . . declaratory relief should ordinarily be denied as well," is not applicable when determining whether to issue a declaratory judgment in a case where no state criminal prosecution is pending.

This argument aims at discrediting the equation of the disruptive effects of declaratory and injunctive relief formulated by Justice Black.[125] The argument, if accepted in all non-pending situations, would create a standard for declaratory relief not based upon the balancing of comity present in all of the pending situations. Normal rules for the propriety of declaratory relief,[126] which would not require a showing of irreparable injury,[127] would control the courts. A mechanical line drawing, at the point where non-pendency ceased, would be dispositive.[128]

Noticeably, Brennan's *Perez* approach exclusively focuses on a state interest that is presumed to be, in all instances, less intense than in the pending situation. Necessarily, such a presump-

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125. See text accompanying note 118 *supra*.

126. See note 28 *supra*.

127. See note 95 *supra*. *Compare* Rakes v. Coleman, 359 F. Supp. 370 (E.D. Va. 1973) (irreparable injury that is real and immediate required in non-pending, but in pending the injury to be irreparable must result from bad faith harassment) *with* Armour & Co. v. BALL, 468 F.2d 76 (6th Cir. 1972) (irreparable injury of any degree not required when no state prosecution is pending). Broadly read, the Court's decision in Steffel v. Thompson, 42 U.S.L.W. 4357 (March 19, 1974), *rev'g* Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972) (requiring bad faith harassment for declaratory relief in the non-pending suit) adopts the *Armour* position.

128. Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974) (discussed in text accompanying notes 142-54 *infra*); Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973); Jones v. Wade, 479 F.2d 1176, 1181 (5th Cir. 1973); Conover v. Montemuro, 477 F.2d 1073, 1082 (3d Cir. 1973); Anderson v. Nemetz, 474 F.2d 814, 819-20 (9th Cir. 1973); Thoms v. Hefferman, 473 F.2d 478, 483 (2d Cir. 1973); Lynch v. Snepp, 472 F.2d 769, 774 (4th Cir. 1973) (civil case); Armour & Co. v. Ball, 468 F.2d 76, 79 (6th Cir. 1972); Wulp v. Corcoran, 454 F.2d 826, 832 (1st Cir. 1972); Hobbs v. Thompson, 448 F.2d 456, 459 (5th Cir. 1971); Lewis v. Kugler, 446 F.2d 1343, 1349 (3d Cir. 1971); Hull v. Petrillo, 439 F.2d 1184, 1186 (2d Cir. 1971); Foster v. Zeeko, 362 F. Supp. 295, 297-98 (N.D. Ill. 1973); Rakes v. Coleman, 359 F. Supp. 370, 379 (E.D. Va. 1973); Doe v. Israel, 358 F. Supp. 1193, 1198 (D.R.I. 1973); Barrick Realty, Inc., v. City of Gary, Indiana, 354 F. Supp. 126, 129 (N.D. Ind. 1973); Cine-Com Theatres Eastern States, Inc., v. Lordi, 351 F. Supp. 42, 51 (D.N.J. 1972).

Steffel, ___ U.S. at ___, 94 S. Ct. at 1223 abolished a distinction drawn by the Fifth Circuit in the non-pending instance between statutes facially attacked and statutes attacked as applied, Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973) (granting declaratory relief when statute attacked on its face while approving the circuit's opinion in Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972), which denied relief when statute was attacked as applied). Thus, *Steffel* eliminated the authority contrary to the proposition that declaratory relief should issue in the non-pending situation, Ellis v. Dyson, 358 F. Supp. 262, 265 (N.D. Tex.), *aff'd without opinion*, 475 F.2d 1402 (5th Cir. 1973), *cert. granted*, ___ U.S. ___, 94 S. Ct. 1967 (1974); Cooley v. Endicter, 340 F. Supp. 15, 19 (N.D. Ga. 1971), *aff'd*, 458 F.2d 513 (5th Cir. 1972) (per curiam).

tion ignores any analysis comparing the disruptive effects of an injunction, which would require a showing of irreparable injury, and a declaratory judgment, which, according to Brennan, would not require such an injury. Moreover, this analysis assumes that in the non-pending situation the federal interest would remain at the same intensity as that in the pending situation, while the state interest would be of diminished importance. In some non-pending situations, Brennan's *Perez* analysis may well be accurate. That is, there should be a federal forum, or else the Declaratory Judgment Act's availability will be overly diminished; thus a comparison of injunctive and declaratory relief would be inappropriate. And, indeed, analysis may demonstrate that the federal interest in securing an adjudication of federal rights may in fact outweigh a diminished state interest. But what analysis may prove in some situations may not hold true in all situations. This is the first defect in a conclusive presumption that declaratory relief is appropriate in all non-pending situations.[129]

A second defect to such a conclusive presumption is that it proves too much. Pendency of state criminal proceedings is measured at the date the federal complaint is filed.[130] Unless the state has then indicted the federal court plaintiff, the state proceeding would appear to lack pendency.[131] In some cases, Brennan's arbitrary line will nonsensically eliminate from consideration a full

129. This assertion may be too broad as far as the *Steffel* holding is concerned. At the district court level, the court held that since "no meaningful contention [could] be made that the state [acted] in bad faith, . . . the rudiments of an actual controversy between the parties . . . [are] lacking." 334 F. Supp. 1386, 1389-90 (N.D. Ga. 1971), see Steffel, ___ U.S. at ___, 94 S. Ct. at 1214. The Fifth Circuit affirmed on the basis that declaratory relief is appropriate in the non-pending case only when bad faith harassment is shown, 459 F.2d 919, 922 (5th Cir. 1972). In reversing, the Supreme Court narrowly held that "federal declaratory relief is *not precluded* when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute . . . ." *Id.* at ___, 94 S. Ct. at 1223-24 (emphasis added). Thus, narrowly read, *Steffel* proposes that plaintiff need not show bad faith harassment to present a justiciable controversy. Broadly read, *Steffel* allows declaratory relief in the non-pending case without a showing of any irreparable injury. What injury will suffice for relief is therefore uncertain. See note 127 *supra*.

130. Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1213 (1974); Jones v. Wade, 479 F.2d 1176, 1178 (5th Cir. 1973); Armour and Co. v. Ball, 468 F.2d 76 (6th Cir. 1972).

131. *E.g.*, Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973). *But see* Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1226 (1974) (Rehnquist, J., concurring) ("For any arrest prior to *resolution* of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*." (emphasis added)).

While it is possible to expand or retract the reach of *Samuels* by establishing a definitive line of demarcation between the pendent and non-pendent, Note, *Federal Injunctions Against State Prosecution—Comity—Pending State Proceedings Which Bar Federal Relief*, 1972 WISC. L. REV. 257 (1972), any such date would, *inter alia*, ignore the

comity balance. An instance is *Jones v. Wade*.[132] There, the federal court plaintiff was arrested and released in the morning; he reached federal court with his complaint in the afternoon; and he was indicted by the state several hours later.[133] In this nonpending case, the Fifth Circuit granted declaratory relief for three analytical reasons: First, the state's administration of justice would be minimally disrupted;[134] second, there would be no guarantee that the plaintiff would have his day in state court;[135] and third, the lengthy delay prior to indictment would unduly prolong the chilling effect on the plaintiff's first amendment rights.[136] A fortiori,[137] a difference of hours[138] would have made *Jones* a pend-

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difference in the several states criminal processes, see Independent Tape Merchant's Assoc. v. Creamer, 346 F. Supp. 456, 460-61 (M.D. Pa. 1972), and foster a race to the court house, see Modern Social Education, Inc. v. Preller, 353 F. Supp. 173, 180 (D. Md. 1973). Most importantly, any line of demarcation will, in some cases, produce a result at odds with a balancing analysis of federal and state interests. See text accompanying note 155 *infra*.

132. 479 F.2d 1176 (5th Cir. 1973) (opinion by Wisdom, J.).

133. *Id.* at 1178.

134. *Id.* at 1181. *Accord*, Wulp v. Corcoran, 454 F.2d 826, 832 (1st Cir. 1972). *See* Armour and Co. v. Ball, 468 F.2d 76, 79 (6th Cir. 1972).

135. 479 F.2d at 1181. *But see* Independent Tape Merchant's Assoc. v. Creamer, 346 F. Supp. 456, 461 (M.D. Pa. 1972) which notes that when state proceedings, although not pending, are imminent

> [t]hese concerns [of comity] are particularly apposite where the federal action has been commenced under circumstances indicating an intent to effectively prevent the prior initiation of state action. A declaratory judgment should not be granted if its issuance appears calculated to award the winner of a race to the courthouse.

See also Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1226 (1974) (Rehnquist, J., concurring); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 97 (1973).

If the pendent result of *Samuels* is grounded upon the assurance of a state forum for the federal court plaintiff, then whenever that assurance is similarly present in the nonpending situation, there should be at least a consideration of this comity factor in the decision on declaratory relief's propriety. See text accompanying notes 166-70 *infra*.

136. 479 F.2d at 1181. A distinction is possible between the federal plaintiff who, following a threat of prosecution, ceases his conduct—the situation in Steffel, ___ U.S. ___, ___, 94 S. Ct. 1209, 1214 (1974)—and the plaintiff who persists in his conduct despite the threat of prosecution, Steffel, ___ U.S. at ___, 94 S. Ct. at 1226 (Rehnquist, J., concurring). In the latter situation, declaratory proceedings could operate as an improper shield for illegal activity. *Id.*

137. See HART & WECHSLER at 1046-49.

138. In Modern Social Education, Inc.,v. Preller, 353 F. Supp. 173 (D. Md. 1973) the court considered the impact of the *Younger* sextet upon the circumstances presented in *Jones*. Judge Harvey, writing in response to the complainant's contention that the *Younger* line of authority was inappropriate because of the impendency rather than pendency of state proceedings, reasoned:

> Were this Court to hold that Younger v. Harris is inapplicable because state criminal proceedings though expected had not been commenced on the date that the federal action was filed, this Court would be adopting a rule that would foster a race to the court house. The legal principles which underlie *Younger* are hardly

ing case controlled by *Younger*, and none of the reasons advanced by Judge Wisdom would possess persuasive force. Therefore, the *Jones* result, consistent with the strict ambit of *Samuels* and Brennan's analysis reflects an absence of any analysis of what the harmonious balance between the states and the federal government requires.

Difficulties with the two Positions

While Justice Brennan's *Perez* formulation proves too much, the same criticism may be levelled against an analysis which rigidly applies the *Samuels* principle to the non-pending situation.[139] Such an analysis would draw, from Justice Black's opinion, the implication that the intrusiveness of a declaratory judgment into the state administration of criminal justice is equivalent to that of an injunction. Therefore, declaratory relief generally should not issue unless the equitable requirements for injunctive relief are present.[140] Such a formulation, while acceptable in the pending situation, assumes that once the balance of comity has been struck in favor of the state administration of its criminal process, the equipose of federal and state interests remains constant, regardless of the posture of the state process. While this may be true in some situations, there is no factor to account for possible fluctuations in the state and federal interests which would allow the balance of comity to shift and, thereby, favor the propriety of a federal declaratory judgment. On the other hand, Justice Brennan, by distinguishing between the pending and non-pending circumstances, attempts to introduce a variable into the

promoted by a ruling that the proper forum for deciding the constitutionality of state statutes is to be determined in a case of this sort by the party which first institutes proceedings.

Id. at 180. See text accompanying note 129 *supra*.

139. Becker v. Thompson, 334 F. Supp. 1386 (N.D. Ga. 1971), *aff'd*, 459 F.2d 919 (5th Cir.), *reh. denied*, 463 F.2d 1338 (5th Cir. 1972), *rev'd sub. nom.* Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974).

As noted in Rakes v. Coleman, 359 F. Supp. 370 (E.D. Va. 1973) a case law analysis could lead to such an application. In Fenner v. Boykin, 271 U.S. 240, 244 (1925), the Court stated that "[a]n intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court." Since *Younger*, a pending case, cited *Fenner*, a non-pending case, and distinguished Dombrowski v. Pfister, 380 U.S. 479 (1965), a non-pending case, the argument concludes that *Fenner* is resurrected and irreparable injury is required for declaratory relief, 359 F. Supp. at 376. In *Rakes*, the district court quite properly read *Younger's* approval of *Fenner* as limited to irreparable injury in the pending situation. *Id. Accord*, Armour and Co. v. Ball, 468 F.2d 76 (6th Cir. 1972). See Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974).

140. See text accompanying notes 120-22 *supra*.

consideration of the state interest, but thereafter assumes the federal interest to remain constant.[141]

Neither Justice Black's broad standards nor Justice Brennan's pendency formulation accurately reflect the balancing nature of comity. In the non-pending situation an application of Justice Black's disruptive effects analysis assumes that there always is a greater than minimal state interest involved. An application of Justice Brennan's non-pendency test, however, assumes that the federal interest will always outweigh whatever state interest may be present. Thus, neither formulation identifies the respective interests involved. Nor does either formulation provide a method for guaging each interests' relative strength.

Rather than providing analytical guidelines, reflective of the balancing nature of comity, for the propriety of federal declaratory relief, *Steffel v. Thompson*,[142] by adopting the pending vs. non-pending formulation of *Perez*, merely perpetuates the discrepancy between the positions of Justices Black and Brennan. Relying upon the "different considerations"[143] of injunctive and declaratory relief, the Court limited the *Samuels* equation to the pending situation where "principles of federalism militated altogether against federal intervention into a class of adjudications."[144] The Court then held that[145]

> regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates

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141. Perez v. Ledesma, 401 U.S. at 120-22 (Brennan J., separate opinion). See text accompanying note 128 *supra* and note 162 *infra*.

142. ___ U.S. ___, 94 S. Ct. 1209 (1974). See note 37 *supra*.

143. *Id.* at ___, 94 S. Ct. at 1221-22. The "different considerations" between declaratory and injunctive relief noted in *Steffel* were:

> First, . . . a declaratory judgment will have a less intensive effect on the administration of state criminal laws . . . . Second, engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment if considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.

Query, in light of the probable res judicata effects of a declaratory judgment and the potential for an injunction as further relief, the validity of any distinction between the intrusive effects of the two forms of relief. See text accompanying notes 99-122 *supra*.

144. *Id.* at ___, 94 S. Ct. at 1222. Referring to federalism in the instant case, the Court said:

> [P]rinciples of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head.

Id.

145. *Id.* at ___, 94 S. Ct. at 1223-24.

> a genuine threat of enforcement of a disputed state criminal statute . . . .

Such a holding, although somewhat ambiguous because of the phrase "is not precluded",[146] seems to indicate that the requisite injury for standing (*i.e.*, a "genuine threat of enforcement") is sufficient, where no state prosecution is pending against the federal court plaintiff, to establish the propriety of federal declaratory relief.

Factually,[147] the result in *Steffel* seems eminently proper. The petitioner, after having been told by the police that continuation of his handbilling conduct would result in arrest under the Georgia criminal trespass law, was surely, as characterized by Justice Brennan, caught "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[148] Under such circumstance, when the plaintiff ceases his conduct, as Steffel did, the state interest sought to be protected by comity would appear to be minimal as compared with the federal interest. The plaintiff's compliance with the state's warning to desist neutralizes the state interest in the orderly administration of its criminal process because it removes any necessity or reason for the state to invoke such process against the federal court plaintiff. On the other half of the comity balance, the federal interest is accentuated by the deterrent effect which nullifies the exercise of a right arguably protected by the constituton. Therefore, under the facts of *Steffel*, an analysis based upon the balancing of federal and state interests[149] yields the same conclusion as the non-pendency formulation. Federal declaratory relief is to be deemed appropriate without regard to an analysis of the irreparability of the injury.[150]

The concurring opinion of Justice Rehnquist[151] indicates that in some situations the non-pending analysis will not always be consistent with the balancing of federal and state interests which

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146. Arguably, *Steffel* does not establish any standards for the propriety of federal declaratory relief, but merely holds, in the non-pending situation, that such relief "is not precluded" in the absence of a showing of the irreparable injury requirement of injunctive relief. *See* note 129 *supra*.

147. See note 37 *supra*.

148. ___ U.S. at ___, 94 S. Ct. at 1217.

149. See text accompanying note 172 *infra*.

150. An argument can be constructed that the deterrence to the complainant's conduct caused by the personal threat of enforcement is, of itself, sufficient to constitute irreparable injury. See note 170 *infra*.

151. ___ U.S. at ___, 94 S. Ct. at 1225.

comity requires. For example, he raises the question of the propriety of a federal declaratory judgment when the plaintiff is threatened by the state but nevertheless continues his activity. Recognizing that "the declaratory judgment procedure is an alternative to pursuit of arguably illegal activity,"[152] Justice Rehnquist concluded:[153]

> There is nothing in the [Declaratory Judgment] Act's history to suggest that Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct. Thus, I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in *Samuels* . . . . The plaintiff who continued to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal law suit.

The point to be made from Justice Rehnquist's analysis of a plaintiff who, unlike Mr. Steffel, persists in his conduct after a warning from the state and seeks federal relief is that a non-pendency formulation does not balance state and federal interests. In *Steffel*, the plaintiff who ceased his conduct peaked the federal interest while eliminating the state interest. In Justice Rehnquist's hypothetical, the state interest retains vitality. Thus, an extension of *Steffel* to that hypothetical on the basis of non-pendency would fail to effectuate a balancing of state and federal interests.[154] As posed by Justice Rehnquist, there may indeed be instances in the non-pending situation where federal

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152. *Id.* at ___, 94 S. Ct. at 126.

153. *Id.* Unfortunately, Justice Rehnquist indicated acceptance of the non-pendency formulation by concluding that "[a]ny arrest prior to resolution of the federal action would constitute a pending prosecution and has relief under the principles of *Samuels*". *Id.* Thus, his approach attempts to account for the potential impropriety of federal declaratory relief in the non-pending instance by redefining pending to include any state prosecution commenced prior to the resolution of the federal suit. See note 131 *supra*.

Justice White, objecting to such a broad definition of pending, observed that in his opinion "a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary considerations of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there." *Id.* at 4365 (concurring opinion). *Cf.* United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (considerations of expenditure of federal judicial resources relevant in determining whether to assume jurisdiction over a "pendent" state law claim).

154. See text accompanying note 168 *infra*.

declaratory relief would be as violative of the principles of comity as in the circumstances presented in *Samuels*.

PROPOSED FORMULATION FOR DETERMINING THE PROPRIETY OF FEDERAL DECLARATORY RELIEF

Plainly, it is necessary to formulate a more precise test for the propriety of a federal declaratory judgment when a state statute is challenged on the constitutional grounds of overbreadth or vagueness.[155] Such a formulation, rather than deciding a case on the basis of either comparative disruptive effects or on the basis of non-pendency, must identify and gauge the strengths of the respective state and federal interests. A proper formulation must decide first whether any real disruption will occur and second whether the strength of the federal interest is great enough to warrant declaratory relief even if it would be disruptive.

As a preliminary matter, it must be shown that the party seeking the federal declaration has sufficient standing to maintain the challenge.[156] The "February Sextet" makes clear that the societal "chilling effect" espoused in *Dombrowski* does not provide an adequate basis for standing.[157] However, under the principles enunciated in *Roe v. Wade*[158] and *Doe v. Bolton*,[159] a plaintiff's allegation that the disputed statute personally deterred him suffices to confer standing. Such personal deterrence must be substantiated by the plaintiff's showing either that the statute is specifically directed at the complainant's interests or that, as in *Steffel*, the complainant has a genuine threat of prosecution under the statute.

Once standing is present, inquiry must then be made into the propriety of federal declaratory relief.[160] In order that both state

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155. In dealing with the effect of vague or overbroad statutes upon the question of the appropriateness of federal relief, Professor Maraist defines the terms as:

> Vagueness connotes imprecision in the scope of the conduct that is regulated by the statute. Overbreadth connotes clarity and precision in expressing the conduct that has been regulated, but the inclusion within the regulation of conduct that it is constitutionally impermissible to regulate.

Maraist, *Federal Intervention in State Criminal Proceedings*: Dombrowski, Younger, *and Beyond*, 50 TEXAS L. REV. 1324, 1344 n.86 (1972).

156. See text accompanying note 88 *supra*.

157. See notes 69-76 *supra* and accompanying text.

158. 410 U.S. 113 (1973).

159. 410 U.S. 179 (1973).

160. Judge Friendly, writing for the three-judge panel in Samuels v. Mackell, 288 F. Supp. 348 (S.D.N.Y. 1968), in considering the impact of Zwickler v. Koota, 389 U.S. 241 (1967) (refusing to abstain), upon the propriety of federal declaratory relief, alluded to a conduct test framed in terms of personal deterrence:

and federal interests might be accurately exposed and thereby be properly balanced by comity, this question should be answered in accordance with two primary considerations: (1) the effect (such as the degree of injury) of the challenged statute upon the conduct of the federal court plaintiff and (2) the ability of the state judicial process to protect adequately the federal court plaintiff's[161] alleged constitutional right.

> We do not think that the Court in *Zwickler* had any intention to overrule the basic principles governing the propriety of declaratory or injunctive relief and to require a federal court to render a declaratory judgment whenever a present or prospective defendant shows that application of a state criminal statute to him would violate a constitutional right, even though there is no possibility that presenting the defense in a pending prosecution and seeking review in the Supreme Court if it is there rejected would "effect the impermissible chilling of the very constitutional right he seeks to protect."

288 F. Supp. at 355 (citation omitted).

More recently Judge Friendly has advocated that the federal courts should be made unavailable for challenges to state statutes, absent a showing of irreparable injury, regardless of the status of state proceedings.

> There would be merit in a statute which provided that, whether state proceedings be pending or impending, a federal court shall not issue an injunction or declaratory judgment against the enforcement of a state criminal statute unless there is no other means of avoiding grave and irreparable harm or where a prosecution would be instituted in bad faith, i.e., with knowledge that there was no reasonable expectation that a valid conviction could be obtained.

H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 98 (1973).

161. In this context, there is the collateral problem of severability. That is, where state criminal proceedings are pending against some, but not all of the federal court plaintiffs, should those against whom the state has not formally acted be permitted to obtain a federal declaration concerning the constitutionality of the challenged statute. A comparison of Locks v. Laird, 441 F.2d 479 (9th Cir.), *cert. denied* 404 U.S. 986 (1971), with Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971), exposes the conflicting views. The Ninth Circuit, denying relief to all plaintiffs, held in *Locks* that a declaratory judgment in favor of those parties not then facing prosecution would effectuate an impermissible interference with the pending state prosecutions. This result was premised upon the court's inability to separate the claims of servicemen not charged with violation of an Air Force regulation prohibiting the wearing of service uniforms at public meetings from the claims of a serviceman who had been court-martialed and convicted, but had not exhausted his appeals. 441 F.2d at 480.

The Third Circuit in *Lewis* reached a contrary result and granted declaratory relief to those plaintiffs not then involved in state prosecutions. The court relied on the federal duty to adjudicate federal rights as expressed in Monroe v. Pape, 365 U.S. 167, 183 (1961), and Zwickler v. Koota, 389 U.S. 241, 248 (1967), to reach the conclusion that the claims of those persons against whom no state proceedings were pending could be severed from the pending claims also presented. 446 F.2d at 1346-48. This reasoning was extended in Salem Inn, Inc. v. Frank, 364 F. Supp. 478 (E.D.N.Y. 1973) where the court granted declaratory relief to both the non-pending and pending claims because "[i]f federal relief is granted to these . . . [non-pending] plaintiffs, it would be anomalous not to extend it to all plaintiffs." *Id.* at 481-82. *Frank* was affirmed, 43 U.S.L.W. 2017 (1974).

Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973) suggests that the problem of severability may be avoided if persons, not facing current state prosecution, were to bring an action for federal relief separately from those immersed in state proceedings. The com-

Scrutiny of the conduct of the complainant after a threat of prosecution under the disputed statute provides an initial indicium of the strength of the federal interest.[162] In this context, as articulated by Justice Brennan, the primary federal concern is to ensure that "individuals [are] able to exercise their constitutional rights without running the risk of becoming law breakers."[163] Thus, the federal interest would appear to be greatest in the situation where the complainant contemplates, but refrains from engaging in, arguably protected conduct because of the deterrent effects of the questioned statute.[164] The federal interest then decreases as the deterrence upon the complainant's conduct diminishes. Hence, when the complainant has acted, either in disregard or ignorance of the state law, the deterrent effect of the statute ceases to be a factor.[165] The remaining federal inter-

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plainant in *Thoms* followed such a procedure, prompting the Second Circuit to note:

> Furthermore persuasive policy considerations suggest that the pendency of criminal proceedings in the state courts against others should not prevent the appellee from obtaining federal anticipatory relief. . . . If federal anticipatory relief were not available, individuals like the appellee in this case would be forced to engage in what they believe is activity protected by the first amendment under the threat of criminal prosecution. Absent the overruling of Dombrowski v. Pfister . . . and Zwickler v. Koota . . . the situation here, where no state prosecution is pending against the individual, is one without the reach of *Younger* and brethren. Where there is no state prosecution pending the individual must linger in uncertainty as to the protected nature of his planned activity and he is subject wholly to the discretion of the state officials . . . . A pending state prosecution at least provides him with a concrete way of resolving doubts about his constitutional rights, whereas such a pending prosecution against another would not necessarily have such an effect.

Id. at 483. In reaching this conclusion, the Second Circuit rejected the state's argument that, inasmuch as the same constitutional issues were pending in a state criminal proceeding, the federal court plaintiff could adequately present his constitutional claim in the state proceeding as amicus curiae. Relying on *Zwickler*, the court stated that the plaintiff's choice of a federal forum to vindicate his constitutional rights must be given "due respect." *Id.* at 486.

Apparently the Supreme Court in Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974) agreed with the reasoning of the Second Circuit on the effect of a pending state prosecution against another party upon the propriety of anticipatory federal declaratory relief. The Court merely noted that the existence of a prosecution against Steffel's handbilling companion "is ample demonstration that petitioner's concern with arrest has not been 'chimerical.'" *Id.* at ___, 94 S. Ct. at 1215-16.

162. See note 6 *supra*.

163. Perez v. Ledesma, 401 U.S. 82, 120 (1971) (separate opinion); Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1216 (1974); see note 82 *supra*.

164. *See* Steffel v. Thompson, ___ U.S. ___, ___, 94 S. Ct. 1209, 1216-22 (1974).

165. *Cf.* Laird v. Tatum, 408 U.S. 1 (1973) (not enough chilling effect for standing when an antiwar group, conscious of federal surveillance, persisted in their activity). In this situation of a warning unheeded, under a close reading of Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974), the individual, unlike Steffel, would have resolved the dilemma of whether to act. To then allow federal declaratory relief to issue would be to

est—that individuals not be punished for the exercise of constitutional rights—would be protected if the federal court plaintiff has an adequate opportunity to adjudicate his constitutional claim. This examination of the impact of the challenged statute upon the activity of the federal party provides a means for recognizing and accounting for variations in the strength of the federal interest half of the balance of comity.

Similarly, consideration of the adequacy of state judicial protection of the alleged constitutional right[166] furnishes a formula sensitive to the fluctuations of the state interest inherent in comity. The state's fundamental interest is in the orderly administra-

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sanction use of the Declaratory Judgment Act as a sword against the states. *Id.* at ___, 94 S. Ct. at 1226 (Rehnquist, J., concurring).

Dombrowski v. Pfister, 380 U.S. 479 (1967) is readily reconcilable with the proposition that deterrence should be a factor in determining the propriety of federal intervention. *Dombrowski* sanctioned federal anticipatory relief in the context of persisting conduct, yet because the police were harassing the individual plaintiffs, the state prosecutorial authorities could easily be characterized as lacking a legitimate interest. Thus, in addition to the finding of irreparable injury, *id.* at 489, *Dombrowski* may also be explained in terms of the balance of comity. That is, the federal interest in protecting constitutional rights outweighed the illegitimate state interest of harassment. Similarly, where the individual ceases his conduct upon a state's warning, there is no state interest in the orderly administration of its laws. By ceasing his conduct, the individual has removed any reason the state might have for further enforcement of the law as against that particular person. In such instance, the federal interest is of greater import than the non-existent or minimal state interest. However, when the individual persists in his conduct, the state, if it is acting in good faith, will arrest the individual, proceed to trial, and thereby provide a forum for the adjudication of the constitutional issue; this process renders federal intervention both unnecessary and highly disruptive.

166. The Court in Fenner v. Boykin, 271 U.S. 240 (1926), articulated the rationale for this examination:

> Ordinarily, there should be no interference with . . . [state] officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge to the validity of some statutes, unless it plainly appears that this course would not afford adequate protection.

Id. at 243-44. Superficially, such a principle would appear to be in conflict with the Supreme Court's more recent mandate in Monroe v. Pape, 365 U.S. 167 (1961) that: "It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked." *Id.* at 183. *Accord*, McNeese v. Board of Educ., 373 U.S. 668, 676 (1963) (iterating that § 1983 actions "may not be defeated" because state-law remedies were not first exhausted). The clear import of these decisions is that the adequacy of any state-law remedies is immaterial to the maintenance of a federal action under 42 U.S.C. § 1983 (1970) for the deprivation of constitutional rights by state action. Thus, when an individual brings a § 1983 action seeking a federal declaration upon the constitutionality of a state statute, a broad reading of the *Monroe* line of cases would require that the adequacy of the state judicial system for the adjudication of the constitutional issue be disregarded. While this proposition may hold true in certain instances, *e.g.*, Steffel v. Thompson, ___ U.S. ___, 94 S. Ct. 1209 (1974), it will not always be sustainable.

tion of its criminal process free from federal intervention.[167] To the extent that the state judicial system is able to ensure the preservation of constitutional rights through its criminal process, the state interest in autonomy reaches its zenith. Such a situation is typified by the events in *Modern Social Education, Inc., v. Preller*[168] where the federal court plaintiff, uninhibited by threats of state prosecution, persisted in his conduct and sought federal declaratory relief in order to shield himself from the state's clear intent to prosecute him due to the continuation of conduct.[169] However, when the state has moved sufficiently toward the federal court plaintiff to confer standing, but then has no further need to invoke its criminal judicial process because of the citizen's subsequent compliance with the state statute, the state judicial system provides no forum to afford adequate protection

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Factually, *Monroe* dealt with a situation in which the complainant, having the choice between a federal forum and a state forum, opted to pursue his constitutional rights in a federal court. Prior to the commencement of any litigation, the violation of the complainant's alleged constitutional right was completed when the Chicago police had concluded a warrantless search of his home. The complaint in *Monroe* was, therefore, seeking redress for prior, completed violations by state officials of his constitutional rights. Under such circumstances, the Court held that the existence of an adequate state remedy to provide restitution did not preclude or bar the bringing of a § 1983 action in federal court. *Id.* at 183.

Thus, *Monroe* does not speak to the question of the weight to be given by a federal court to the adequacy of state procedures to prevent *future* state encroachment upon alleged constitutional rights. It is to this point which the Court was addressing itself in *Fenner, supra.* This line of cases, culminating in Younger v. Harris, 401 U.S. 37 (1971), indicates that the ability of the state judicial process to guard against future state contravention of an individual's constitutional rights is significant to the determination of the availability of federal relief.

Hence, it becomes crucial to determine whether the plaintiff is seeking redress for prior deprivation of his constitutional rights or attempting to prevent future violations by state officials of such rights. In the context of a § 1983 challenge to the constitutionality of a state statute, this determination will depend largely upon the conduct of the federal court plaintiff. When the individual ceases his conduct because of the personal deterrent effects of the statute, the state encroachment upon alleged constitutional rights would then be complete. Therefore, *Monroe* requires that the propriety of federal relief be determined without regard to the availability of state remedies such as a state declaratory judgment procedure. *See* Steffel v. Thompson, ___ U.S. ___, ___ n.22, 94 S. Ct. 1209, 1224 n.22 (1974). However, when an individual continues his conduct in defiance of state warnings of future prosecution and seeks federal declaratory relief, the injury to his constitutional rights is not then complete. By persisting in his conduct, the federal court plaintiff has ignored the deterrent injury to his constitutional rights and is attempting to prevent future interference, by way of a state criminal prosecution, with his rights. Under these circumstances, *Fenner* requires that the federal court first examine the adequacy of state judicial process for the future protection of the alleged constitutional right.

167. See note 7 *supra.*

168. 353 F. Supp. 173 (D. Md. 1973).

169. *See* text accompanying note 132 *supra.*

of the federal court plaintiff's constitutional right.[170] In such circumstances, the state interest element of comity diminishes and ultimately becomes miniscule.

Under the formulation, as thus far developed, the interdependence of the state and federal interests should be apparent. As a generalization, it may be said that once sufficient injury is established for standing, an inverse relationship exists between the two interests. The federal interest is greatest at the point where the state interest is minimal, and the converse is equally true. Thus, strictly as a guideline, the propriety of federal declaratory[171] relief may be determined in accordance with the following time line. At the point where the federal plaintiff, genuinely fearful of state prosecution, refrains from continuing his activity, a federal declaration on the constitutionality of the state statute

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170. Arguably, when the individual ceases his conduct and thereby precludes the availability of a state criminal forum to adjudicate the constitutional issue, the deterrent injury is irreparable. Younger v. Harris, 401 U.S. 37 (1971) (discussed in notes 12 and 95 *supra*) set forth as one means of establishing irreparable injury a showing that "the threat to the plaintiff's federally protected rights . . . be one that cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46 (dictum). *Accord* Byrne v. Karalexis, 401 U.S. 216, 220 (1971). This language was specifically addressed to the problem of multiple prosecutions found, in Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965), to constitute irreparable injury. However, an a fortiori argument would conclude that if irreparable injury is shown when a single state prosecution will not adequately vindicate the individual's constitutional rights, the same degree of injury is established when no state criminal forum, in which the constitutional issue might be raised, would be provided.

This argument is supported by the Court's issuance of an injunction against future enforcement of the Washington Anti-Alien Land Law in Terrace v. Thompson, 263 U.S. 197 (1923) (discussed note 82 *supra*). There, the deterrent effect of the statute, which caused the federal court plaintiff to forego his planned leasing activity, was held to constitute sufficient injury to satisfy the equitable requirement of irreparable injury for the issuance of an injunction. *Id.* at 215-16 (1923). *See also* Pierce v. Society of Sisters, 268 U.S. 510, 523 (1925); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500 (1925).

In Steffel v. Thompson, ___ U.S. ___, ___ n.12, 94 S. Ct. 1209, 1218 n.12 (1974), Justice Brennan also alludes to the possibility that the deterrent effects of a state statute upon the exercise of one's constitutional rights might constitute irreparable injury: "There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to *forego* constitutionally protected activity in order to avoid arrest."

171. An argument can be constructed that even in the non-pending situation, declaratory relief cannot be adequately distinguished from an injunction, *see* text accompanying note 105 *supra*. As such, irreparable injury should be required for declaratory as well as injunctive relief. Thus the conduct analysis is equally applicable to the issuance of either form of relief. See note 170 *supra*. Where the individual has stopped his conduct, there is no remedy at law, i.e., no state forum, and the injury would be irreparable: Arguably constitutional activity would cease unless federal relief issued. Thus, not only should declaratory relief issue, but also injunctive relief should be available. Indeed, this analysis would provide for a quick issuance of a temporary restraining order to protect speech that has reached a "propitious" or "ripe" moment.

under which prosecution is threatened should be appropriate. In this situation, the state has merely threatened to invoke its criminal process *if the federal plaintiff persists in his activity*. The state interest is, therefore, minimal unless the federal party disregards the state warning and continues to act. On the federal side of comity, the interest in protecting constitutional rights without a requirement of personal exposure to criminal sanctions is great. Thus, if the federal court plaintiff, as in *Steffel*, is deterred from arguably protected activity by the presence of the state statute and state threats of enforcement should the activity continue, the federal interest outweighs the state. Therefore federal declaratory relief is appropriate.

Conversely, if the federal plaintiff has chosen to disregard the state warning, then, assuming the state's good faith,[172] the state criminal process will be invoked. The plaintiff will be provided with an adequate opportunity ultimately to adjudicate his constitutional claim in the state court. Since the federal plaintiff has chosen to become a "law breaker," the state interest in autonomy becomes paramount. Federal declaratory relief should be deemed inappropriate. Of course, this conclusion assumes that the state criminal process can be shown capable of furnishing an adequate forum for the determination of the constitutional issue.[173]

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172. Good faith might be negatively defined in terms of abuse of prosecutorial discretion by state authorities. That is, the state's good faith may be established by a showing that such discretion was not being used primarily for the purpose of deterring conduct arguably sanctioned by the constitution. *See* Cameron v. Johnson, 390 U.S. 611, 621 (1968) (noting that bad faith was not to be inferred merely from the innocence of the accused; "the question was whether the statute was enforced against them [federal court plaintiffs] with no expectation of convictions but only to discourage exercise of protected rights"). Therefore, under *Cameron* the existence of any evidence to support the state charges against the federal court plaintiff would tend to substantiate a showing of good faith. *See* HART & WECHSLER at 1045-46.

Note, however, in *Cameron* the Court was dealing with an allegation that pending state prosecutions had been brought in bad faith to harass the federal court plaintiffs. Thus, the enquiry regarding good faith was limited solely to the question of whether the state might validly expect to obtain a conviction. A somewhat different enquiry is posed where the individual, rejecting state warnings, persists in his conduct and seeks federal relief prior to the institution of formal state proceedings against him. In such circumstances, not only is the *Cameron* enquiry of expectation of conviction relevant, but there is the preliminary matter of whether the state will, in fact, commence formal proceedings against the federal court plaintiff. In this instance, good faith would have to include some showing by the state prosecutory authorities that they were moving towards indictment of the federal court plaintiff and not simply attempting to restrict the individual's constitutional rights.

173. In the instance of a single federal court plaintiff, this condition is always met if it can be shown that the state prosecutorial authorities will act in good faith. However, when there are multiple plaintiffs engaging in continuous conduct, a single state criminal trial of one of them may not provide an adequate state forum for those other individuals,

In conclusion, this formulation, by providing a means for evaluation of the relative strengths of the state and federal interests, accurately reflects the balancing element of comity. As such, this conduct analysis is preferable to any pendency formulation for the preservation of "Our Federalism."

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see Dombrowski v. Pfister, 380 U.S. 479 (1965). Therefore, as indicated by *Steffel*, federal declaratory relief should issue in favor of those persons not involved in the state proceeding. *See* note 161 *supra*.